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# Supreme Court of the United States

October Term, 1976

No. 76-5774

HUGO ZACCHINI,  
*Petitioner,*

vs.

SCRIPPS-HOWARD BROADCASTING COMPANY,  
*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI To the Supreme Court of Ohio

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## **PETITION FOR A WRIT OF CERTIORARI To the Supreme Court of Ohio**

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Petitioner, Hugo Zacchini, respectfully prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of the State of Ohio entered in this proceeding July 28, 1976.

## **OPINIONS BELOW**

The opinion of the Ohio Supreme Court, appended hereto at page A2 is reported at 47 Ohio St. 2d 224.

The opinion of the Eighth District Court of Appeals of the State of Ohio, appended hereto as page A27 is not yet reported.

No written opinion was entered by the trial court in the Court of Common Pleas for Cuyahoga County, Ohio.



### **JURISDICTIONAL STATEMENT**

The judgment of the Supreme Court of Ohio was entered on July 28, 1976 under docket number 75-995.

The jurisdiction of this Court is invoked under the provisions of 28 U.S.C. §1257(3).

### **QUESTION PRESENTED**

Where a performer has a protected "right of publicity"—the right of exclusive control over his professional affairs—and that right is held as a matter of state law to have been infringed by a television station's filming of his entire act over his specific objection and the broadcasting thereof on a nightly news show, is the television station's tortious conduct immunized as a matter of law by the First Amendment of the United States Constitution as interpreted in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) and *Time, Inc. v. Hill*, 385 U.S. 374 (1967).

### **CONSTITUTIONAL PROVISIONS**

#### **United States Constitution—Amendment I**

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

### **STATEMENT OF THE CASE**

The entire record in this action, which is reproduced commencing at page A49 hereof, consists of plaintiff's complaint, defendant's answer and defendant's motion for summary judgment supported by two affidavits and an exhibit.

Plaintiff's complaint, filed July 2, 1973, alleged that he is in the entertainment business; that he performs an act originated by his father and performed only by his family for fifty years; that while appearing at the Burton Fair he was approached by an employee of defendant with regard to filming his act and he requested that the performance not be filmed; that notwithstanding such request his entire performance was filmed and shown on defendant's television station; that "the defendant showed and commercialized the film of his act without his consent and such conduct by the defendant was an unlawful appropriation of plaintiff's professional property".

Defendant's answer admitted that plaintiff's performance had been filmed and broadcast. However, it put at issue whether such had been done over the plaintiff's objection. In separate defenses the answer challenged the sufficiency of the complaint to state a claim upon which relief can be granted and alleged that its conduct was protected "by the rights of freedom of speech and freedom of the press as contained in that Constitution of the United States and the State of Ohio".

On March 11, 1974, defendant filed a motion for summary judgment. That motion was supported by two affidavits and an exhibit.

The first affidavit was from the representative of defendant who was responsible for plaintiff's act having been

filmed. That affidavit reflected that while at the Burton Fair on August 30, 1972 he had witnessed plaintiff's performance which "consisted of him being shot out of a cannon into a net located approximately 200 feet away". The affidavit further states that on that date the "plaintiff requested that his act not be filmed". The following day the affiant reported on his activities to the producer of defendant's Eyewitness News Program, including the fact plaintiff had objected to any filming, and he was directed to return to the fair and film plaintiff's performance. He did so, and submitted the film for use on that evening's eleven o'clock Eyewitness News.

The second affidavit was of a co-anchorman on the eleven o'clock Eyewitness News Program. He stated that on the program of September 1, 1972 a fifteen second news clip of plaintiff's act was televised, and identified the script text read while the film clip was being shown. The script was appended as an exhibit to the affidavit.

On April 29, 1974 an entry issued from the trial court granting defendant's motion for summary judgment. However, no opinion was issued upon such ruling so we do not have the benefit of the trial court's reasoning.

Plaintiff prosecuted an appeal to the Eighth District Court of Appeals. In that proceeding it was asserted that "appellee's conduct is not protected by the First Amendment", thus raising the question presented herein. On July 10, 1975 the court of appeals reversed the decision of the trial court. While the ruling of the three judges was unanimous, two separate opinions were rendered which proceeded on somewhat different grounds. Quite candidly, the opinions of the two judges went well beyond the issues which were briefed and argued, and certain of the points upon which reversal was based originated with the court.

The defendant then sought review in the Supreme Court of Ohio. The action was accepted for review, presenting as the appellant's first proposition of law that: A television station is privileged under Article I, Section 2 of the Ohio Constitution and the First Amendment of the Federal Constitution to film a public performance by a human cannonball and broadcast a fifteen second film clip of the performance on its news program.

On July 28, 1976 the Ohio Supreme Court issued its decision. The syllabus of opinion (through which the court officially speaks) is as follows:

1. One who appropriates to his own use or benefit the name or likeness of another is subject to liability to the other for invasion of his privacy, and the use or benefit need not necessarily be commercial.

2. The performer of a "human cannonball" act has a right to the publicity value of his performance, and the appropriation of that right over his objection without license or privilege is an invasion of his privacy.

3. A TV station has a privilege to report in its newscasts matters of legitimate public interest which would otherwise be protected by an individual's right of publicity, unless the actual intent of the TV station was to appropriate the benefit of the publicity for some non-privileged private use, or unless the actual intent was to injure the individual.

In the course of the court's opinion the rationale of the Court of Appeals, and particularly those matters raised *sua sponte*, as to the foundation for an actionable claim for relief by plaintiff were essentially rejected. The court posed the controlling issues as it perceived them to be:



Did the videotaping and broadcasting over his objection of plaintiff's entire act constitute that form of invasion of privacy referred to as appropriation of a plaintiff's name and likeness and, if so, was the television station privileged to do so?

As to the first proposition, the court held that the defendant's conduct constituted an actionable tort in Ohio. The right which the court found infringed was the "right of publicity", the first time such right had been recognized in Ohio. On this aspect of the action the court concluded as follows:

It is this right, a right of exclusive control over the publicity given to his performances, which the plaintiff seeks to protect. For a performer, this right is a valuable part of the benefit which may be attained by his talents and efforts, and we think that this right is entitled to legal protection, contrary to the holding of some earlier cases. See, e.g., *Gautier v. Pro-Football* (1952), 304 N.Y. 354, 107 N.E.2d 485; *O'Brien v. Pabst Sales Co.* (C.A. 5, 1942), 124 F.2d 167.

We may assume that a right of publicity inheres in a performer, at least to the extent that the performer has not abandoned the right by effectively dedicating it to the public in whole or in part, or has failed to give reasonable notice to the public, and we need not consider when the right is abandoned or lost under the facts of this case. We may reasonably assume that the plaintiff's performance of his act in a county fair was not such an abandonment of his right of publicity that anyone might over his stated objection and without license or privilege, film the performance and broadcast the film to millions of viewers in the area.

The court then proceeded to "the decisive issue in this case"—"whether the defendant had a privilege to film and televise the plaintiff's performance on its nightly news program, and if so whether that privilege was abused". For guidance on that issue the court turned to the rulings in *Time, Inc. v. Hill*, 385 U.S. 374 (1967) and *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). Based upon its analysis of those authorities the court concluded that defendant was entitled, as a matter of law, to immunity under a claim of privilege for its tortious conduct. Drawing from the two cited authorities the concept that the news media had a privilege to disseminate news of matters of public interest the court concluded thusly:

... it is clear that a public performance in a county fair is a matter of legitimate public interest, just as the opening of a new play was held to be. Plaintiff argues by implication that the TV broadcast infringed upon his rights because it showed his entire performance, and that the taking of his whole act, albeit one which only lasts a few seconds, is equivalent to the broadcast of an entire play or the publication, and thus passes the limits of any rights of reporting or fair comment. From the performer's point of view, that position is, of course, understandable, for a film or a videotape of a performance comes very close to actually reproducing the performance itself. However, the primary value which one society places upon freedom of speech and of press requires that we reject that viewpoint. The press, if it is to be able to freely report matters of public interest, must be accorded broad latitude in its choice of how much it presents of each story or incident, and of the emphasis to be given to such presentation. *No fixed standard which would bar the press from reporting or depicting an entire occurrence or an entire discrete part of a public*

performance can be formulated which would not unduly restrict the "breathing room" in reporting which freedom of the press requires. The proper standard must necessarily be whether the matters reported were of public interest, and if so, the press will be liable for appropriation of a performer's right of publicity only if its actual intent was not to report the performance, but, rather, to appropriate the performance for some other private use, or if the actual intent was to injure the performer. (emphasis added)

Justice Celebrezze dissented from the court's decision. He asserted that the majority's reliance upon the *Time, Inc. v. Hill* and *New York Times* rulings was conceptually improper, and that even if relevant the failure to consider the effect of the later decisions in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974) and *Time, Inc. v. Firestone*, ..... U.S. ...., 47 L. Ed. 2d 154 (1976), undermined the conclusions reached by majority. He further disagreed with the majority's determination that final judgment was proper, pointing out five factual issues which he maintained precluded a determination that defendant was entitled to summary judgment as a matter of law.

### ARGUMENT IN SUPPORT OF GRANTING THE WRIT

While this action might at first blush appear to be a simple continuation of the long-standing problem of resolving the conflicting interests of "free press" versus "right of privacy", and was treated as such by the Ohio Supreme Court in determining the same under the principles of *Time, Inc. v. Hill*, 385 U.S. 374 (1967), and *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), petitioner submits that such is not the case. Petitioner contends

that this action presents a distinct question of first impression<sup>1</sup>, and that while it arises from a confrontation between the rights of the press and those of an individual the considerations which are represented in the line of authority flowing from *New York Times Co. v. Sullivan*, *supra*, through *Time, Inc. v. Firestone*, ..... U.S. ...., 47 L. Ed. 2d 154 (1976), are so dissimilar to those presented in this suit as to render this Court's prior decisions inapplicable.

The trap into which the Ohio Supreme Court has fallen in arriving at its decision is one of relying upon labels: this action presents a conflict between "free press" and "right of publicity"; the "right of publicity" is a part of the "right of privacy"; *Time, Inc. v. Hill* dealt with the matters of "free press" and "right of privacy"; it therefore follows that the rule of *New York Times* as applied in *Time, Inc. v. Hill* should apply in this case. While such line of reasoning is superficially attractive it completely disregards the facts that the interests of the individual with which we are here concerned bear no relationship to those previously considered by this Court, that the underpinnings of the two cited authorities are not relevant to the fact situation presented herein, that the basis upon which liability might be imposed upon the press under those holdings could not be present in the context of this case, and that the law enunciated in those decisions has been modified by later rulings of this Court.

<sup>1</sup>Insofar as petitioner has been able to determine, there is not another reported decision in which the broadcast media's First Amendment privilege has been interposed and recognized as a defense to the total appropriation of a performer's right of publicity. The decisions in *Man v. Warner Bros., Inc.*, 317 F. Supp. 50 (S.D.N.Y., 1970) and *Gautier v. Pro-Football, Inc.*, 304 N.Y. 354, 107 N.E.2d 485 (1952) which bear some factual relationship to this suit, are distinguishable in that each was brought under §51 of the New York Civil Rights Law, Consol. Laws, c.6, and the courts held that such statute affords no protection for invasions of the right of publicity.



The most fundamental error of the Ohio Supreme Court is in not recognizing that the "right of publicity", while being categorized as a part of the overall "right of privacy", is an interest having such distinctive attributes as to require particularized individual consideration. Petitioner submits that in its approach to this case the Ohio Supreme Court has run afoul of this Court's recent warning that "[w]hatever their general validity, use of such subject matter classifications to determine the extent of constitutional protection afforded . . . may too often result in an improper balance between the competing interests" *Time, Inc. v. Firestone*, ..... U.S. ...., 47 L. Ed. 2d 154, 164 (1976).

Dean Prosser, in his review of the "right of privacy", concludes that it is not one tort but a complex of four distinct kinds of invasion of four different interests which are tied together by a common name "but otherwise have almost nothing in common except that each represents an interference with the right of the plaintiff" PROSSER, *LAW OF TORTS* (4th Ed., 1971) p. 804. It is the failure to recognize the distinctiveness of the four separate torts which has led to confusion in decisional authorities. *Id.*, at p. 814.

While it has been said that for nearly twenty years the courts have been haunted by the "myth" that the tort of appropriation (which encompasses the right of publicity) involves an actual right of privacy, Pember and Teiter, *Privacy and the Press Since Time, Inc. v. Hill*, 50 WASH. L.R. 57, 88 (1974), there are several well-reasoned decisions which do observe the conceptual distinction which eluded the court below. One of the first cases in which the "right of publicity" was recognized is *Haelan Laboratories v. Topps Chewing Gum*, 202 F.2d 866 (2d Cir. 1953), the court holding that such right was "in addition to and

independent of" the classical right of privacy. The same conclusion was reached by the Third Circuit in *Ettore v. Philco Television Broadcasting Corp.*, 229 F.2d 481 (3rd Cir. 1955). An oft-cited decision in this area, in which the court found the distinction between the right of publicity and other torts classified under the right of privacy to be of controlling importance, is *Uhlaender v. Henricksen*, 316 F. Supp. 1277 (Minn. 1970). Quite recently it has been said:

While much confusion is generated by the notion that the right of publicity emanates from the classic right of privacy, the two rights are clearly separable. The protection from intrusion upon an individual's privacy, on the one hand, and protection from appropriation of some element of an individual's personality for commercial exploitation on the other hand are different in theory and scope. *Price v. Hal Roach Studios, Inc.*, 400 F. Supp. 836, 843 (S.D.N.Y. 1975).

See also, *Canessa v. J.I. Kislak, Inc.*, 97 N.J. Super. 327, 235 A.2d 62 (1967).

What are these fundamental differences of which the courts and commentators speak? They are essentially that the tort of appropriation involves the commercial exploitation of a person before the public eye, whereas the traditional forms of invasion of privacy involve placing before the public either something theretofore secret or putting a "false light" upon facts previously known. PROSSER, *supra*, at p. 814. The "false light" doctrine is somewhat akin to, though not necessarily identical with, the torts of libel and defamation. As will be developed hereinafter, those distinctions should preclude the application of the authorities relied upon by the Supreme Court of Ohio, particularly in the factual context of this action.



Before undertaking a review of the decisions of this Court relied upon by the Ohio Supreme Court, and other rulings pertinent thereto, petitioner believes that the scope of the Ohio Supreme Court's ruling herein should be examined. Petitioner submits that while the decision of the Ohio Supreme Court appears to grant a qualified immunity, its effect is to virtually, totally insulate the broadcast media from liability. Of the two qualifications engrafted upon the basic immunity, one is a contradiction in terms while the other is a practical nullity.

The first exception as stated is that liability might attach if the "actual intent was not to report the performance, but, rather, to appropriate the performance for some other private use". That proposition is a complete non-sequitur. If the "basic standard" of immunity is that the broadcast is of "matters reported [which] were of public interest" there is simply no room under that standard for a private use for purposes other than reporting. A finding that the broadcast was a reporting of a matter of public interest would in and of itself preclude a finding of private use. Therefore, any broadcast of a performance by a public personality would be exempt from potential liability. The implications of this are staggering. If the broadcast media is completely immune from liability from transmitting or reproducing all or parts of public performances it will be free to appropriate without compensation whatever it chooses. That contingency is virtually invited by the Ohio Supreme Court's holding that a standard which would bar the "reporting or depicting either an entire occurrence or an entire discrete part of a public performance" is constitutionally impermissible. In these times of ratings wars between television stations such an invitation might well be too tempting to resist.

The second qualification is that immunity would not be granted if "the actual intent was to injure the performer". How could such intent be proved, particularly in response to the obvious argument that added public exposure necessarily benefits the performer. Petitioner submits that this amorphous right of recovery is of no value whatsoever.

Such an immunity goes far beyond any rights heretofore granted the press by any court. It runs counter to admonitions from this Court as to sacrificing individual rights in the name of freedom of the press. This Court has recognized the validity of the proposition that:

Newspapers, magazines and broadcasting companies are businesses conducted for profit and often make very large ones. Like other enterprises that inflict damage in the course of performing a service highly useful to the public . . . they must pay the freight, and injured parties should not be relegated [to remedies which] make collection of their claims difficult or impossible unless strong policy considerations demand. *Buckley v. New York Post Corp.*, 373 F.2d 175, 182. *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 147 (1967).

Justice Fortas, dissenting in *Time, Inc. v. Hill*, 385 U.S. 374, 420 (1967), expressed the matter thusly:

The courts may not and must not permit either public or private action that censors or inhibits the press. But part of this responsibility is to preserve values and procedures which assure the ordinary citizen that the press is not above the reach of the law—that its special prerogatives, granted because of its special and vital functions, are reasonably equated with its needs in the performance of these functions. For this

Court totally to immunize the press—whether forthrightly or by subtle indirection—in areas far beyond the needs of news, comment on public persons and events, discussion of public issues and the like would be of no service to freedom of the press, but an invitation to public hostility to that freedom.

See also, *Dietemann v. Time, Inc.*, 284 F. Supp. 925, 932 (C.D. Cal. 1968).

Let us now then turn to the prior rulings of this Court to determine whether the conclusions of the Ohio Supreme Court are mandated and/or appropriate thereunder.

While the primary authority drawn upon by the Ohio Supreme Court is the decision in *Time, Inc. v. Hill*, 385 U.S. 374 (1967), that ruling, in turn, draws from *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). It is, therefore, appropriate that the inquiry start with the *New York Times* decision.

In *New York Times* the plaintiff had brought a libel action predicated upon an advertisement carried in the defendant's newspaper. The advertisement related to civil rights activities and, in part, was critical of certain police actions and public officials in Montgomery, Alabama. In his state court suit the plaintiff, a state official, recovered a \$500,000 verdict. Upon review before this Court the historical antecedents of the First Amendment privilege of the press were reviewed, and premised upon the reality that "erroneous statement is inevitable in free debate, and that it must be protected if the freedoms of expression are to have the 'breathing space' that they 'need to survive' ", *id.*, pp. 271-272, the rule was articulated that a public official cannot recover damages for a defamatory falsehood relating to his official conduct unless he proves that

the statement was made with "actual malice"—that is, with knowledge that it was false or with reckless disregard of whether it was false or not. *Id.*, pp. 279-280.

Intervening between the *New York Times* decision and *Time, Inc. v. Hill* are the decisions in *Garrison v. Louisiana*, 379 U.S. 64 (1964); *Henry v. Collins*, 380 U.S. 356 (1965); and *Rosenblatt v. Baer*, 388 U.S. 75 (1966). In each of those cases the *New York Times* rule was applied to a fact situation involving criticism of public officials as to matters relating to their public positions. It is worth noting that in *Rosenblatt* the court referred to the "motivating force" behind the *New York Times* decision as protection for the "strong interest in debate on public issues" and the "strong interest in debate about those persons who are in a position significantly to influence the resolution of those issues". *Id.*, at p. 85.

We now arrive at *Time, Inc. v. Hill*, 383 U.S. 374 (1967). The plaintiff's action in that suit was predicated upon the "false light" theory of the right of privacy. The factual predicate was that Life magazine had reported on the opening of a play which was based on a book which was based on an actual event. The book, however, was a fictionalized version of the actual event and contained matter not responsive to the actual happening. The magazine article made it appear as though the plaintiff had suffered through the events portrayed in the fictionalized version. In an opinion expressing the views of five members of the court Justice Brennan found the principles of *New York Times* applicable. Premised upon the proposition that "the guarantees for free speech and press are not the preserve of political expression or comment upon public affairs", *id.*, at p. 388, that opinion states:

We create a grave risk of serious impairment of the indispensable service of a free press with the impos-



sible burden of verifying to a certainty the facts associated in news articles with a person's name, picture or portrait. . . . *Id.*, at p. 389.

The opinion notes, however, that the *New York Times* rule was deemed applicable only in the "discrete context" of the facts of the case, and there is a suggestion that if the facts were somewhat different it might not apply. *id.*, at p. 391. Justice Harlan, while concurring in the result, argued for a less stringent standard than that of *New York Times*. He observed that the fact situation did not entail the "market place of ideas" and that the plaintiff did not have the opportunity for rebuttal which a public official has as to criticism directed to his public affairs. *Id.*, at p. 407.

If we were to stop at this point, as did the Ohio Supreme Court, it would be evident that the principles upon which those decisions are based simply cannot apply to the instant case. Both *New York Times* and *Time, Inc. v. Hill* involved the dissemination of allegedly false information. In this case the dissemination is of a visual reproduction, a matter of truthful reproduction. The rule of law applied in those decisions permitted of a recovery upon proof that the defendant acted with knowledge of falsity or reckless disregard for the truth. No such consideration could apply herein. In *Time, Inc. v. Hill* a partial rationale for the immunity granted was the burden of absolutely verifying the accuracy of the information put before the public. Here that burden does not exist.

However, we cannot rest at this point, for further decisions of this Court make manifest the error of applying *Time, Inc. v. Hill* to this action.

In *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967), the court ruled upon two actions which had been accepted

for review in order to consider the impact of *New York Times* upon persons who were "public figures" but not public officials. *Id.*, at p. 134. While agreeing upon the results in each action, the court was unable to agree upon a standard to be adopted. Justice Harlan, in an opinion joined in by Justices Stewart and Fortas, was in favor of a standard which would permit the imposition of liability upon a showing of "highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers". *Id.*, at p. 155. Other justices urged the application of the *New York Times* standard, while Justices Black and Douglas argued for abandonment of *New York Times* in favor of total immunity for the press from libel suits. *Id.*, at p. 172. In the opinion of Justice Harlan the following is found:

. . . to take the rule found appropriate in *New York Times* to resolve the "tension" between the particular constitutional interest there involved and the interests of personal reputation and press responsibility [citation omitted] as being applicable throughout the realm of the broader constitutional interest, would be to attribute to this aspect of *New York Times* an unintended inexorability at the threshold of this new constitutional development. In *Time, Inc. v. Hill*, *supra*, 385 U.S. at 390, we counselled against "blind application of *New York Times Co. v. Sullivan*. . . ." *Id.*, at p. 148. (emphasis added)

The fact that dissemination of information and opinion on questions of public concern is ordinarily a legitimate, protected and indeed cherished activity does not mean, however, that one may in all respects carry on that activity exempt from sanctions designed to safeguard the legitimate interests of others. *Id.*, at p. 150.

The next significant decision of this Court was in *Rosenbloom v. Metromedia*, 403 U.S. 29 (1971)<sup>2</sup>. Its importance does not lie so much in what was decided (in fact the case was resolved by a plurality) but rather in its subsequent repudiation in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974). The judgment of the court was rendered in an opinion by Justice Brennan, applying the *New York Times* standard to a charge of defamation brought by an individual who was involved in a matter of public concern. The point of departure among the justices was whether *New York Times* should apply to an individual who was neither a public official nor a public figure.

That issue was resolved within three years in *Gertz v. Robert Welch, Inc.*, *supra*. The plaintiff in that libel action was found to be neither a public official nor a public figure. The district court had entered judgment in the defendant's favor under the *New York Times* doctrine. The court of appeals affirmed that ruling "because it read *Rosenbloom* to require the application of the *New York Times* standard to any publication or broadcast about an issue of significant public interest, without regard to the position, fame, or anonymity of the person defamed." *Id.*, at p. 330. That decision was reversed, this Court holding "that the state interest in compensating injury to the reputation of private individuals requires that a different rule should obtain with respect to them". *Id.*, at p. 343. In response to the argument that adoption of a less stringent standard than that of *New York Times* would harm a free press the court stated:

<sup>2</sup>Between the *Curtis Publishing* and *Rosenbloom* decisions the *New York Times* rule was applied in *Beckley Newspapers Corp. v. Hanks*, 389 U.S. 81 (1967), *Greenbelt Cooperative Publishing Assn. v. Bressler*, 398 U.S. 6 (1970), *Monitor Patriot v. Roy*, 401 U.S. 265 (1971), *Time, Inc. v. Pape*, 401 U.S. 279 (1971), and *Ocala Star-Banner v. Damron*, 401 U.S. 295 (1971). However, each of those actions involved considerations basically similar to those of the *New York Times* case itself.

The need to avoid self-censorship by the news media is, however, not the only societal value at issue. If it were, this Court would have embraced long ago the view that publishers and broadcasters enjoy on unconditional and indefeasible immunity from liability for defamation. [citations omitted]. Such a rule would, indeed, obviate the fear that the prospect of civil liability for injurious falsehood might dissuade a timorous press from the effective exercise of First Amendment freedoms. Yet absolute protection for the communications media requires a total sacrifice of the competing value served by the law of defamation. *Id.*, at p. 341.

Petitioner submits that the clear import of *Gertz v. Robert Welch, Inc.* is a narrowing back of *New York Times* to the context in which the rule arose.

In *Cantrell v. Forest City Publishing Co.*, 419 U.S. 245 (1974) and *Cox Broadcasting v. Cohn*, 420 U.S. 469 (1975), this Court rather clearly cautioned against too broad readings of *New York Times* and *Time, Inc. v. Hill*.

In *Cantrell*, a "false light" case, the court found that liability was properly imposed under the existing standards, but took the occasion to note that:

Consequently, this case presents no occasion to consider whether a State may constitutionally apply a more relaxed standard of liability for a publisher or broadcaster of false statements injurious to a private individual under a false-light theory of invasion of privacy, or whether the constitutional standard announced in *Time, Inc. v. Hill* applies to all false-light cases. 419 U.S. 245, pp. 250-251.



A similar caution was extended in the *Cox Broadcasting* ruling: "We should recognize that we do not have at issue here an action for the invasion of privacy involving the appropriation of one's name or photograph". 420 U.S. 469, 489. A fair reading of *Cox Broadcasting* fully reflects the narrowing of the *New York Times* standard as reflected in *Gertz v. Robert Welch, Inc.* In fact, Justice Powell in his review of decisional authorities in his concurrence observes that the *Gertz* decision "calls into question the conceptual basis of *Time, Inc. v. Hill*". 420 U.S. 469, 498.

The past term this Court refused to extend "the rather drastic limitations worked by the *New York Times*". *Time, Inc. v. Firestone*, ..... U.S. ...., 47 L. Ed. 2d 154, 164 (1976). Petitioner submits that the *Firestone* opinion reinforces the limitations worked upon *New York Times Co. v. Sullivan*, *supra*, and *Time, Inc. v. Hill*, *supra*, by *Gertz v. Robert Welch, Inc.*, *supra*, which were completely ignored by the Ohio Supreme Court.

It should thus be evident that the Ohio Supreme Court's application of the *New York Times* standard in this case is a "blind application", as cautioned against by this Court almost ten years ago, and in total disregard of the latest constructions of the First Amendment by this Court. The doctrine of *New York Times* had its genesis in and is being returned to the protection of the right of the press to freely disseminate information regarding persons whose views and activities are of real importance to a vital on-going society. Without demeaning plaintiff's livelihood, Hugo Zacchini being shot out of a cannon is not one of the burning issues of our day.

Petitioner should not be understood as advancing the contention that, absent the protection of *New York Times*, defendant must be held liable. There can be no doubt

that defendant is entitled to some privilege under the First Amendment. The virtual total immunity granted by the Ohio Supreme Court, however, is not the answer. A middle ground must be arrived at.

Perhaps plaintiff's activities are of sufficient interest to the public to warrant some television coverage. Perhaps it was inevitable that such coverage would encompass broadcasting of his entire act. Perhaps plaintiff sustained no damage as a consequence of defendant's acts. Nevertheless, petitioner submits that those considerations are matters for a jury to resolve under a constitutional standard which properly recognizes the rights of the individual and the press.<sup>3</sup>

Petitioner recognizes that resolution of this action will, in all probability, require the formulation of new constitutional standards, which may be no easy task, and that at this point petitioner's arguments essentially present the negative of the case. Should review be granted, direction can be focused upon the formulation of an appropriate standard to replace that adopted by the Ohio Supreme Court. In this regard petitioner is drawn to the observation in *Ettore v. Philco Television Broadcasting Corp.*, 229 F.2d 481, 490 (3rd Cir. 1955), that "Concededly the theory is a somewhat hazy one; but that is not unusual where the laboratories of the courts are working out the development of a new common law right". At the risk of being overly-dramatic, if the result of the work done in the laboratory of the Ohio Supreme Court is not to loose a Frankenstein monster upon the land further surgery must be performed upon its creation.

<sup>3</sup>While the facts of this case are such that the possibility of a *de minimis* argument might be advanced, the fact remains that the rule adopted by the Ohio Supreme Court would plainly have equal application to the filming and broadcasting of an entire performance by the Cleveland Symphony Orchestra at its open-air summer facility at the Blossom Center.



### CONCLUSION

Petitioner submits that the decision of the Ohio Supreme Court here presented for review represents a misapplication of the First Amendment privilege of the press generally, and particularly represents an improper extension of *New York Times Co. v. Sullivan, supra*, and *Time, Inc. v. Hill, supra*, and prays that a writ of certiorari issue, that the final judgment entered herein be vacated, and that the action be remanded to the Common Pleas Court of Cuyahoga County, Ohio for further proceedings.

Respectfully submitted,

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### APPENDIX

#### JUDGMENT ENTRY OF THE SUPREME COURT OF OHIO

(Decided July 28, 1976)

No. 75-995

THE SUPREME COURT OF THE STATE OF OHIO  
THE STATE OF OHIO, CITY OF COLUMBUS

HUGO ZACCHINI,  
*Appellee,*

vs.

SCRIPPS-HOWARD BROADCASTING COMPANY,  
*Appellant.*

Judgment reversed.

# OPINION OF THE SUPREME COURT OF OHIO

(Decided July 28, 1976)

No. 75-995

THE SUPREME COURT OF THE STATE OF OHIO

THE STATE OF OHIO, CITY OF COLUMBUS

HUGO ZACCHINI,

*Appellee,*

vs.

SCRIPPS-HOWARD BROADCASTING COMPANY,

*Appellant.*

1. One who appropriates to his own use or benefit the name or likeness of another is subject to liability to the other for invasion of his privacy, and the use or benefit need not necessarily be commercial.
2. The performer of a "human cannonball" act has a right to the publicity value of his performance, and the appropriation of that right over his objection without license or privilege is an invasion of his privacy.
3. A TV station has a privilege to report in its newscasts matters of legitimate public interest which would otherwise be protected by an individual's right of publicity, unless the actual intent of the TV station was to appropriate the benefit of the publicity for some non-privileged private use, or unless the actual intent was to injure the individual.

APPEAL from the Court of Appeals for Cuyahoga County.

The plaintiff, Hugo Zacchini, is a "human cannonball." He performs the feat of being shot from a cannon into a net some 200 feet away. The entire performance lasts about 15 seconds.

In August and September of 1972, the plaintiff was regularly performing his act at the Geauga County Fair in Burton, Ohio. Each performance was staged in an open grandstand area for the pleasure of anyone attending the fair, and no separate admission was charged.

On August 30, 1972, a freelance news reporter for defendant Scripps-Howard Broadcasting Company, the owners of television station WEWS in Cleveland, attended the fair. Mr. Zacchini noticed the reporter and asked him not to film the performance. Although the reporter did not film the performance that day, he returned on the following day by order of the producer of defendant's Eyewitness News Program and videotaped the entire "human cannonball" act. WEWS broadcast a fifteen-second film clip of the act on its eleven o'clock news program on September 1, with commentary by a newscaster who described the act as a "thriller" and "you really need to see it in person \* \* \* to appreciate it \* \* \*."

Plaintiff sued the defendant for invasion of privacy, contending that the defendant had appropriated the plaintiff's professional talents for its own use. The trial court granted the defendant's motion for summary judgment. The Court of Appeals reversed that judgment, the majority holding that the complaint stated a cause of action for both conversion and invasion of common law copyright. Judge Manos concurred in the judgment only, on the theory that the complaint stated a claim for appropriation of the common-law right of publicity.

The cause is before this court pursuant to an allowance of a motion to certify the record.

STERN, J. The complaint in this case claimed that "the defendant showed and commercialized the film of \* \* \* [plaintiff's] act without his consent and such conduct by the defendant was unlawful appropriation of plaintiff's professional property." Appropriation is a well-recognized branch of the more general tort of interference with the right of privacy. In *Housh v. Peth* (1956), 165 Ohio St. 35, 133 N. E. 2d 340, this court affirmed the principle that each individual has a legally protected right of privacy. In paragraph two of the syllabus of that case, the court held that:

"An actionable invasion of the right of privacy is the unwarranted appropriation or exploitation of one's personality, the publicizing of one's private affairs with which the public has no legitimate concern, or the wrongful intrusion into one's private activities in such a manner as to outrage or cause mental suffering, shame or humiliation to a person of ordinary sensibilities."

Appropriation is also recognized as a distinct form of invasion of privacy by the proposed Restatement of Torts, and by a leading commentator. Restatement of Torts 2d (Tentative Draft, No. 21 [1975]), Section 652C; Prosser, Privacy, 48 Calif. L. Rev. 383, 401-07.

The majority of the Court of Appeals, however, found that the recognized forms of invasion of privacy, including appropriation, do not "provide a logically adequate embrace for the wrong the plaintiff claims has been done." The court proceeded to find that a performer's act is property entitled to protection under the common law and held that: "The total appropriation of a performer's act by video-taping and re-showing without the performer's permission is an invasion of a property right which will give rise to a cause of action for damages based either on conversion or the invasion of the performer's common law copyright."

It is the opinion of this court that plaintiff's claim is one for invasion of the right of privacy by appropriation, and should be considered as such. The Court of Appeals raised other issues in this case, *sua sponte*, and has, in our view, improperly and unwarrantedly disregarded the principles underlying conversion and common law copyright. A few comments on those subjects are therefore in order.

Conversion is a wrongful exercise of dominion over property in exclusion of the right of the owner, or withholding it from his possession under a claim inconsistent with his rights. *Railroad Co. v. O'Donnell* (1892), 49 Ohio St. 489, 497, 32 N. E. 476. Although the original rule at common law was that only tangible chattels could be converted, it is now generally held that intangible rights which are customarily merged in or identified with some document may also be converted. Examples include drafts,<sup>1</sup> bank passbooks,<sup>2</sup> and deeds.<sup>3</sup> See Prosser, *The Law of Torts* (4th ed. 1971), at pages 81-82. See, generally, Annotation, 44 A. L. R. 2d 927. But conversion does not apply to any intangible right, and certainly it has never been held that one's countenance or image is "converted" by being photographed. The difficulties with any such holding are apparent. "Taking" a photograph of someone does not in fact take anything from that person. If the photograph or film is only a conversion when shown to others, we may well ask to how many others it must be shown, and how often, before it becomes actionable. The distinguishing characteristic of conversion is the forced judicial sale of the chattel or right of which the owner has been wrongfully

<sup>1</sup>*Gibsonburg Banking Co. v. Wakeman Banking Co.* (1900), 20 C. C. 591, 10 C. D. 754.

<sup>2</sup>*Stebbins v. North Adams Trust Co.* (1922), 243 Mass. 69, 136 N. E. 880.

<sup>3</sup>*Hayes v. Massachusetts Mut. Life Ins. Co.* (1888), 125 Ill. 626, 18 N. E. 322.



deprived. In the case of such intangible quasi-proprietary rights as are involved here, a forced sale would be largely absurd, because of the doubtfulness of determining what has been "taken." Is it the right to perform the act, to view it, to present it on television, to license its filming, or some other right? Judicial ingenuity could perhaps award damages and find a *res* said to be sold. But to extend the ambit of conversion to rights such as those claimed by plaintiff, which are more appropriately considered under wholly distinct legal principles, is confusing, unnecessary, and improper.

Common law copyright is similar to statutory copyright, in that it recognizes the right of the author or creator of an original literary or artistic work to legal protection of his efforts. It is a right which arises out of the very act of creation. If a work may be copyrighted under the statutes, it will also be protected by common law before it is published or statutorily copyrighted, and the two forms of copyright are closely related, since the common law copyright expires when the protection of statutory copyright is acquired. See 1 Nimmer on Copyright 38-42.1, Section 11.1.

Plaintiff's performance of his act is plainly not a "writing" within any of the statutory classification of works capable of copyright registration. Sections 4, 5, Title 17, U. S. Code. These statutory requirements do not restrict the common law protection for unpublished works, but they do suggest some appropriate limits to the sorts of intellectual property and rights which are properly copyrightable. It has been suggested, for example, that non-tangible oral expression should be protected by the common law, even though these are outside the statute. Cf. *Estate of Hemingway v. Random House* (1968), 23 N. Y. 2d 341, 296 N. Y. S. 2d 711 with 1 Nimmer on Copyright, *supra*.

The essential purpose of copyrights, to foster and protect literary and artistic expression, might well warrant expansion coverage to such communications. But this plaintiff's performance is safely outside even those bounds of copyright. It is not a literary or artistic expression, nor is it a dramatic composition, nor is it original. To extend common law copyright to protect such spectacles as "human cannonballs," and to employ doubtful logic to hold that public performances do not constitute a publication which would terminate the right, would be to grant a perpetual right against copying, presumably both by other performers or by photographers, which would be even greater than the protection accorded by patents or statutory copyrights. Common law copyright should not be so extended. In short, it has no application to this case.

We proceed, then, to the issues we find to be raised in this case: Did the videotaping and broadcasting over his objection of plaintiff's entire act constitute that form of invasion of privacy referred to as appropriation of a plaintiff's name and likeness and, if so, was the television station privileged to do so?

The concept of a right of privacy was first proposed in a celebrated law review article by Samuel D. Warren and Louis D. Brandeis in 1890. *The Right to Privacy*, 4 Harv. L. Rev. 193. Although initially rejected by the New York courts, the right of privacy was soon accepted by many state courts and enacted by statute in other states, including New York. Many of the early cases concerning the right of privacy involved the commercial use of plaintiff's name, picture and likeness for such business purposes as advertising a product, or adding luster to the name of a corporation, and many of these cases arose under statutes which granted a right of privacy based upon appro-

priation of one's name or face only to exploitation "for advertising purposes or for the purposes of trade." 8 McKinney's Consolidated Laws of New York, Civil Rights, Section 50. See, e.g., *Cardy v. Maxwell* (Sup. Ct. 1957), 9 Misc. 2d 329, 169 N.Y.S.2d 547.

In a jurisdiction where the right of privacy is a matter of common law, the courts have not limited the right solely to commercial appropriation, and have, for example, granted an injunction to prevent a woman from wrongly claiming she was the plaintiff's common law wife. (*Burns v. Stevens* [1926], 236 Mich. 443, 210 N.W. 482); cancelled a birth certificate wrongly naming the plaintiff as father (*Vanderbilt v. Mitchell* [1907], 72 N. J. Eq. 910, 67 A. 97); enjoined the unauthorized use of a prominent politician's name by a political party (*State, ex rel. LaFollette v. Hinkle* [1924], 131 Wash. 86, 229 P. 317); and found actionable the signing of plaintiff's name to a telegram urging the governor to veto a bill (*Hinish v. Meier & Frank Co.* [1941], 166 Ore. 482, 113 P. 2d 438). The interest which the law protects is that of each individual to the exclusive use of his own identity, and that interest is entitled to protection from misuse whether the misuse is for commercial purposes or otherwise. The commercial use of a person's identity is likely to be more offensive to its subject, and may serve in some cases to distinguish mere incidental use of a person's name and likeness, which is not actionable, from appropriation of the benefits associated with the person's identity, which is. But the fundamental wrong is the appropriation for one's self of the benefits of another's name, likeness, or identity, and the wrong is the same whether or not that benefit is pecuniary. The applicable principles are well set out in Restatement of Torts 2d (Tentative Draft No. 13, 1967), Section 652C, and the comments

thereto, at pages 108 *et seq.*, portions of which are quoted below.<sup>4</sup>

<sup>4</sup>Section 652C "One who appropriates to his own use or benefit the name or likeness of another is subject to liability to the other for invasion of his privacy.

"Comment:

"a. The interest protected by the rule stated in this Section is the interest of the individual in the exclusive use of his own identity, in so far as it is represented by his name or likeness, and in so far as such use may be of benefit to him or to others. Although the protection of his personal feelings against mental distress is an important factor leading to a recognition of the rule, the right created by it is in the nature of a property right, for the exercise of which an exclusive license may be given to a third person, which will entitle such a licensee to maintain an action to protect it. The right of such a third person has sometimes been called a 'right of publicity.'

"b. *How invaded.* The common form of invasion of privacy under the rule here stated is the appropriation and use of the plaintiff's name or likeness to advertise the defendant's business or product, or for some similar commercial purpose. Apart from statute, however, the rule stated is not limited to such commercial appropriations. It applies also where the defendant makes use of the plaintiff's name or likeness for his own purposes and benefit, even though such use is not a commercial one, and even though the benefit sought to be obtained is not a pecuniary one. Statutes in New York, Oklahoma, Utah and Virginia have, however, limited the liability to commercial uses of names or likeness.

"\* \* \*

"c. *Appropriation.* In order that there may be liability under the rule stated in this section, the defendant must have appropriated to his own use or benefit the reputation, prestige, social or commercial standing, public interest or other values of the plaintiff's name or likeness. It is not enough that the defendant has adopted for himself a name that is the same as that of the plaintiff, so long as he does not pass himself off as the plaintiff, or otherwise seek to obtain for himself the values or benefits of the plaintiff's name or identity. Unless there is such an appropriation, the defendant is free to call himself by any name he likes, whether there be only one person or a thousand others of the same name. Until the value of the name has in some way been appropriated, there is no tort. Compare, as to the use of a personal name as an infringement to the rights connected with a trade name, the rule stated in Section 722.

"\* \* \*

(Continued on following page)



The determinative question is, accordingly, not whether the defendant's taking and use of the films of plaintiff's act was commercial, but, rather, whether that taking and use constituted the appropriation of the defendant's exclusive rights to his own likeness and identity.

It seems, of course, somewhat anomalous for the plaintiff, who regularly performs in public before large crowds, to claim a right of privacy. The very purpose of a performer is to lure people to come watch him, and certainly the plaintiff hoped not for privacy, but for crowds of thrilled spectators. But there is no real anomaly; the "privacy" which the performer seeks is personal control over commercial display and exploitation of his personality and the exercise of his talents. In other words, performers and other public figures wish to keep the benefits of their performances private, or at least to retain control over them, in much the same way that any individual would wish to keep control over his name and face. Judge Jerome N. Frank has aptly called this aspect of privacy "the right of publicity":

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Footnote continued—

"d. *Incidental use of name or likeness.* The value of the plaintiff's name is not appropriated by mere mention of it, or by reference to it in connection with legitimate mention of his public activities; nor is the value of his likeness appropriated when it is published for purposes other than taking advantage of his reputation, prestige, or other value associated with him, for purposes of publicity. No one has the right to object merely because his name, or his appearance, is brought before the public, since neither is in any way a private matter, and both are open to public observation. It is only when the publicity is given for the purpose of appropriating to the defendant's benefit the commercial or other values associated with the name or the likeness that the right of privacy is invaded. The fact that the defendant is engaged in the business of publication, for example of a newspaper, out of which he makes or seeks to make a profit, is not enough to make such incidental publication a commercial use of the name or likeness. Thus a newspaper, although it is not a philanthropic institution, does not become liable under the rule stated in this Section to every person whose name or likeness it publishes."

"\* \* \* We think that, in addition to and independent of that right of privacy (which in New York derives from statute), a man has a right in the publicity value of his photograph, i. e., the right to grant the exclusive privilege of publishing his picture, and that such a grant may validly be made 'in gross,' i. e., without an accompanying transfer of a business or of anything else. Whether it be labelled a 'property' right is immaterial; for here, as often elsewhere, the tag 'property' simply symbolizes the fact that courts enforce a claim which has pecuniary worth.

"This right might be called a 'right of publicity.' For it is common knowledge that many prominent persons (especially actors and ball-players), far from having their feelings bruised through public exposure of their likenesses, would feel sorely deprived if they no longer received money for authorizing advertisements, popularizing their countenances, displayed in newspapers, magazines, busses, trains and subways. This right of publicity would usually yield them no money unless it could be made the subject of an exclusive grant which barred any other advertiser from using their pictures." *Haelan Laboratories, Inc. v. Topps, Chewing Gum, Inc.* (C.A. 2, 1953), 202 F.2d 866, 868. See, also, *Pittsburgh Athletic Co. v. KQV Broadcasting Co.* (1938), 24 F. Supp. 490.

It is this right, a right of exclusive control over the publicity given to his performances, which the plaintiff seeks to protect. For a performer, this right is a valuable part of the benefit which may be attained by his talents and efforts, and we think that this right is entitled to legal protection, contrary to the holding of some earlier cases. See, e. g., *Gautier v. Pro-Football* (1952), 304 N.Y. 354, 107 N.E.2d 485; *O'Brien v. Pabst Sales Co.* (C.A. 5, 1942), 124 F.2d 167.

We may assume that a right of publicity inheres in a performer, at least to the extent that the performer has not abandoned the right by effectively dedicating it to the public in whole or in part, or has failed to give reasonable notice to the public, and we need not consider when the right is abandoned or lost under the facts of this case. We may reasonably assume that the plaintiff's performance of his act in a county fair was not such an abandonment of his right of publicity that anyone might, over his stated objection and without license or privilege, film the performance and broadcast the film to millions of viewers in the area.

The decisive issue in this case, then, is whether the defendant TV station had a privilege to film and televise the plaintiff's performance, on its nightly news program, and if so whether that privilege was abused.

In *Time, Inc. v. Hill* (1967), 385 U.S. 374, the action was for invasion of the right of privacy under the New York statute, essentially under the category of placing a person in a false light. In that case, the court held, at pages 387-88, "that the constitutional protections for speech and press preclude the application of the New York statute to redress false reports of matters of public interest in the absence of proof that the defendant published the report with knowledge of its falsity or in reckless disregard of the truth." On its face, this holding might be taken to mean that any truthful report which constitutes an invasion of privacy is privileged. In fact, it is not likely that the court meant to go so far. The principle of the case is that freedom of the press inevitably imposes certain limits upon an individual's right of privacy. As the court stated further:

"\* \* \* Exposure of the self to others in varying degrees is a concomitant of life in a civilized community. The risk of this exposure is an essential incident of life in a society which places a primary value on freedom of speech and of press. 'Freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period.' *Thornhill v. Alabama*, 310 U.S. 88, 102. 'No suggestion can be found in the Constitution that the freedom there guaranteed for speech and the press bears an inverse ratio to the timeliness and importance of the ideas seeking expressions.' *Bridges v. California*, 314 U.S. 252, 269. We have no doubt that the subject of the Life article, the opening of a new play linked to an actual incident, is a matter of public interest. 'The line between the informing and the entertaining is too elusive for the protection of \* \* \* [freedom of the press].' *Winters v. New York*, 333 U.S. 507, 510. Erroneous statement is no less inevitable in such a case than in the case of comment upon public affairs, and in both, if innocent or merely negligent, '\* \* \* it must be protected if the freedoms of expression are to have the "breathing space" that they "need \* \* \* to survive" \* \* \*'. *New York Times Co. v. Sullivan*, *supra*, at 271-272. As James Madison said, 'Some degree of abuse is inseparable from the proper use of every thing; and in no instance is this more true than in that of the press.' 4 Elliot's Debates on the Federal Constitution 571 (1876 ed.). \* \* \*"

The effect of this holding, and of that in *New York Times Co. v. Sullivan* (1964), 376 U.S. 254, is that the press has a privilege to report matters of legitimate public interest even though such reports might intrude on matters otherwise private. See Restatement of Torts 2d (Tentative



Draft No. 13, 1967)<sup>5</sup> Section 652 F. In cases involving claims of false light, that privilege may be lost by publication of knowing falsehoods, or in reckless disregard of the truth. Just as the press was held to be privileged to report matters which would otherwise be private, if they are of public concern, so too, it must be held privileged when an individual seeks to publicly exploit his talents while keeping the benefits private. The same privilege exists in cases where appropriation of a right of publicity is claimed, and the privilege may properly be said to be lost where the actual intent of the publication is not to give publicity to matters of legitimate public concern.

No such claim of abuse was made in this case, nor does it appear any could be made. The 15 second film clip of plaintiff's public performance was broadcast a single time on a regular nightly news program. Under the standard articulated by the court in *Time, Inc. v. Hill, supra*, it is clear that a public performance in a county fair is a matter of legitimate public interest, just as the opening of a new play was held to be. Plaintiff argues by implication that the TV broadcast infringed upon his rights because it showed his entire performance, and that such a taking of his whole act, albeit one which only lasts a few seconds, is equivalent to the broadcast of an entire play or the publication, and thus passes the limits of any rights of reporting or fair comment. From the performer's point

<sup>5</sup>Tentative Draft No. 21, of the Restatement of Torts, modifies Dean Prosser's formulation of the right of privacy somewhat by formulating the issue to be whether the appropriation is an "unreasonable" invasion of privacy, rather than whether it is privileged. However, since the gravamen of the issue in this case is not whether the degree of intrusion is reasonable, but whether First Amendment principles require that the right of privacy give way to the public right to be informed of matters of public interest and concern, the concept of privilege seems the more useful and appropriate one. This approach does not suggest, however, that a claimed appropriation might not be *de minimis*.

of view, that position is, of course, understandable, for a film or video tape of a performance comes very close to actually reproducing the performance itself. However, the primary value which one society places upon freedom of speech and of press requires that we reject that viewpoint. The press, if it is to be able to freely report matters of public interest, must be accorded broad latitude in its choice of how much it presents of each story or incident, and of the emphasis to be given to such presentation. No fixed standard which would bar the press from reporting or depicting either an entire occurrence or an entire discrete part of a public performance can be formulated which would not unduly restrict the "breathing room" in reporting which freedom of the press requires. The proper standard must necessarily be whether the matters reported were of public interest, and if so, the press will be liable for appropriation of a performer's right of publicity only if its actual intent was not to report the performance, but, rather, to appropriate the performance for some other private use, or if the actual intent was to injure the performer. It might also be the case that the press would be liable if it recklessly disregarded contract rights existing between the plaintiff and a third person to present the performance to the public, but that question is not presented here.

Here, the TV station was privileged to report the facts of Mr. Zacchini's performance in a newscast, because the performance was a matter of legitimate public interest. No abuse appears which would defeat that privilege. The judgment of the Court of Appeal is reversed and the judgment of the Court of Common Pleas is reinstated.

*Judgment reversed.*

O'NEILL, C. J., HERBERT, CORRIGAN, W. BROWN and P. BROWN, JJ., concur.

CELEBREZZE, J., concurs in part and dissents in part.

CELEBREZZE, J., concurring in part and dissenting in part. Although I concur in paragraphs one and two of the syllabus of the majority opinion, for the reasons that follow, I must dissent from paragraph three of the syllabus and from the judgment.

The majority opinion properly rejects the theories of conversion and common law copyright adopted, *sua sponte*, by the Court of Appeals as rationale supporting its decision, and, additionally, properly characterizes the instant cause of action as involving the "right of publicity." In this regard, the majority opinion states:

"It is this right, a right of exclusive control over the publicity given to his performances, which the plaintiff seeks to protect. For a performer, this right is a valuable part of the benefit which may be attained by his talents and efforts, and we think that this right is entitled to legal protection \* \* \*."

In applying the above stated principle to the facts of this cause, the majority opinion proclaims that " \* \* \* [w]e may reasonably assume that the plaintiff's performance of his act in a county fair was not such an abandonment of his right of publicity that anyone might, over his stated objection and without license or privilege, film the performance and broadcast the film to millions of viewers in the area."

Yet, the majority opinion concludes that Scripps-Howard Broadcasting Company may do just that, by holding, as a matter of law, that a privilege obtains in favor of the media when reporting "matters of legitimate public interest" such that the instant cause of action must be defeated.

For two reasons, I strenuously disagree with the result reached by the majority in this case.

First, the majority's reliance upon *Time, Inc. v. Hill* (1967), 385 U.S. 374, and *New York Times Co. v. Sullivan* (1964), 376 U.S. 254, in support of its decision is questionable, at best, and is clearly erroneous, at worst. A significant body of case law has developed subsequent to those decisions that must be recognized in the event the principles elucidated in *New York Times Co. v. Sullivan, supra*, and *Time, Inc. v. Hill, supra*, are applied herein. Examination of the relevant decisions is, therefore, appropriate.

In *New York Times Co. v. Sullivan, supra*, the Supreme Court of the United States held that before a newspaper may be held liable in damages to a "public official" in a defamation action, it must be established that the publication giving rise to the cause of action was made "with actual malice." The court defined "actual malice" as requiring a plaintiff to prove that the defamatory statement was made "with knowledge that it was false or with reckless disregard of whether it was false or not." *New York Times Co. v. Sullivan, supra* (376 U.S., at page 280). In *Curtis Publishing Co. v. Butts* (1967), 388 U.S. 130, the court extended application of the *New York Times* "actual malice" standard to "public figures." In *Rosenbloom v. Metromedia, Inc.* (1971), 403 U.S. 29, a plurality of the court further extended application of the *New York Times* standard to actions in defamation brought by private persons whenever the statements allegedly defamatory concerned matters of general or public interest.

However, in *Gertz v. Robert Welch, Inc.* (1974), 418 U.S. 323, the court repudiated the plurality opinion in *Rosenbloom*, stating, at page 346, that "extension of the *New York Times* test proposed by the *Rosenbloom* plurality would abridge \* \* \* [a] legitimate state interest to a degree that we find unacceptable."



In *Gertz*, the court held, at page 347, that " \* \* \* so long as they do not impose liability without fault, the states may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual. This approach provides a more equitable boundary between the competing concerns involved here. It recognizes the strength of the legitimate state interest in compensating private individuals for wrongful injury to reputation, yet shields the press and broadcast media from the rigors of strict liability for defamation. \* \* \* " (Footnote omitted.)

" \* \* \* We endorse this approach in recognition of the strong and legitimate state interest in compensating private individuals for injury to reputation. But this countervailing state interest extends no further than compensation for actual injury. For reasons stated below, we hold that the states may not permit recovery of presumed or punitive damages, at least when liability is not based on a showing of knowledge of falsity or reckless disregard for the truth. \* \* \* " *Id.*, at page 348.

The *Gertz* court also established guidelines to be followed by trial courts in considering whether a particular person is a "public figure." In this regard, the court, at page 345, stated:

" \* \* \* For the most part those who attain this status have assumed roles of especial prominence in the affairs of society. Some occupy positions of such persuasive power and influence that they are deemed public figures for all purposes. More commonly, those classed as public figures have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved. In either event, they invite attention and comment."

Recently, in *Time, Inc. v. Firestone* (1976), ..... U.S. ...., 47 L. Ed. 2d 154, the Supreme Court of the United States reaffirmed its holding in *Gertz v. Robert Welch, Inc.*, *supra*.

Examination of the foregoing cases discloses that the Supreme Court of the United States has determined not to apply the strict test enunciated in *New York Times Co. v. Sullivan*, *supra* (376 U.S. 254), to defamation actions instituted against the media by private individuals.

The law expressed in *Time, Inc. v. Hill*, *supra* (385 U.S. 374), must be viewed in light of *Gertz v. Robert Welch, Inc.*, *supra*, and *Time, Inc. v. Firestone*, *supra*.

In *Time, Inc. v. Hill*, the court applied the *New York Times* standard to a "false-light" invasion of privacy action commenced by a private individual. In the next "false-light" case, however, *Cantrell v. Forest City Pub. Co.* (1974), 419 U.S. 245, the court, although applying the *New York Times* standard because the trial court had, without objection, instructed the jury upon it with the result that a verdict was obtained against the defendant-publisher, intimated that the *New York Times* standard need not constitutionally be applied in false-light cases brought by private individuals, citing *Gertz v. Robert Welch, Inc.*, *supra*.

The implication of the foregoing analysis as applied to the facts of the instant cause is obvious. There is essentially little difference in denominating a cause of action as "false-light invasion of privacy" as opposed to "defamation," because the legal theory utilized to decide both will be the same. In my view, the decision in *Gertz v. Robert Welch, Inc.*, will eventually be held to apply to both types of actions. Accordingly, although neither the false-light nor the defamation appellation can accurately be attached



to the instant cause of action, for the reason that no falsity is alleged by the plaintiff herein, it appears to me that the principles announced in *Gertz v. Robert Welch, Inc.*, *supra*, effectively supersede the rationale upon which *Time, Inc. v. Hill*, *supra*, was based, and, therefore reliance by the majority upon *Time, Inc. v. Hill* is misplaced.

Consistent with the above, in my view the majority opinion herein falls into serious error by applying the stricter standard of *New York Times Co. v. Sullivan*, *supra*, to the facts of this cause. Additionally, the majority opinion conceivably errs by characterizing the standard to be used in the first instance, as "whether the matters reported were of public interest," as that standard was rejected in *Gertz v. Robert Welch, Inc.*, *supra*, at least in instances where the plaintiff is neither a "public official" nor a "public figure."

I have reviewed the foregoing authorities only because of the reliance placed upon *Time, Inc. v. Hill*, *supra*, and *New York Times Co. v. Sullivan*, *supra*, by the majority. Although the issues presented in false-light, invasion of privacy and defamation actions are similar to those presented in the instant "right of publicity" action insofar as First Amendment rights and privileges of newspaper and broadcast media are concerned, the issues presented herein are distinctly different in all other respects, and require separate analysis.

This is a case of first impression in this state. It basically involves a further review of the principles first enunciated in this state in *Housh v. Peth* (1956), 165 Ohio St. 35, wherein the court established that an action may properly be commenced to protect or vindicate a right of privacy.

In the instant cause of action, the plaintiff, Mr. Hugo Zacchini, sought to vindicate the alleged unlawful appropriation of his professional property by the defendant, Scripps-Howard Broadcasting Company.

The facts of this case are simple, and basically uncontradicted. In his complaint, plaintiff alleges "that he is engaged in the entertainment business and that the act which he performs is an act which was invented by his father and has been performed only by his family for the last fifty years." The act to which he refers is colloquially known as the "human cannonball act." In this act, Zacchini is shot out of a cannon into a net approximately 200 feet distant. The entire performance occupies 15 seconds of time.

In August and September, 1972, Zacchini performed his act at the Geauga County Fair, in Burton, Ohio. On or about August 30, 1972, Zacchini requested a free-lance news reporter employed by the defendant not to film his act. However, on September 1, 1972, this reporter did film Zacchini's entire act upon the express order of his superior, the producer of defendant's Eyewitness News Program. The entire act as filmed was broadcast that night on defendant's 11:00 P.M. news program.

Two fundamental questions are presented herein: (1) Whether the above rendition of facts is sufficient to state a cause of action; and (2) if so, whether summary judgment was appropriately granted to the defendant.

The majority opinion concludes that plaintiff stated a cause of action. I agree.

As the majority opinion accurately indicates, plaintiff's cause of action in this case rests upon a claimed infringement of his "right of publicity." This right springs,

as illustrated in the majority opinion, from the first form of invasion of privacy described by Dean Prosser in his Handbook of the Law of Torts (4 Ed.), at page 804, as appropriation of the plaintiff's name or likeness. However, this "right of publicity" differs from the other three forms of invasion of privacy characterized by Dean Prosser in that it, unlike the others, generally involves a pecuniary loss, an interference with property. That is because, as in the instant cause, the identity appropriated has an actual or potential commercial value. See, generally, Gordon, Right of Property in Name, Likeness, Personality and History, 55 Nw. U. L. Rev. 553 (1960).

It is now largely beyond dispute that an individual, such as Zacchini, involved in the entertainment or competitive athletic business, has a valuable property right in his or her name, photograph, image and performance, and that this right may be sold. See, e. g., *Motschenbacher v. R. J. Reynolds Tobacco Co.* (C.A. 9, 1974), 498 F.2d 821; *Cepeda v. Swift & Co.* (C.A. 8, 1969), 415 F.2d 1205; *Price v. Hal Roach Studios, Inc.* (S.D. N.Y. 1975), 400 F. Supp. 236; *Uhlaender v. Henricksen* (D. Minn. 1970), 316 F. Supp. 1277; *Sharman v. C. Schmidt & Sons, Inc.* (E.D. Pa. 1963), 216 F. Supp. 401. See, also, *Ettore v. Philco Television Broadcasting Corp.* (C.A. 3, 1956), 229 F.2d 481; *Haelan Laboratories v. Topps Chewing Gum* (C.A. 2, 1953), 202 F.2d 866, certiorari denied, 346 U.S. 816; *Grant v. Esquire, Inc.* (S.D. N.Y. 1973), 367 F. Supp. 876; *Canessa v. J. I. Kislak, Inc.* (1967), 97 N. J. Super. 327, 235 A.2d 62; *Hogan v. A. S. Barnes & Co.* (C.P. Pa. 1957), 114 U.S.P.Q. 314. The fundamental concept involved in the "right of publicity" cause of action is the theory that "a person has the right to enjoy the fruits of his own industry free from unjustified interference." *Uhlaender v. Henricksen*, *supra* (316 F. Supp., at page 1282). (Citations omitted.)

Although the majority opinion recognizes the existence of this "right of publicity," it concludes that summary judgment was appropriately granted under the facts of this cause. I disagree.

Civ. R. 56 (C) provides, in pertinent part:

"\* \* \* Summary judgment shall be rendered forthwith if the pleading, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence in the pending case, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. No evidence or stipulation may be considered except as stated in this rule. A summary judgment shall not be rendered unless it appears from such evidence or stipulation and only therefrom, that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, such party being entitled to have the evidence or stipulation construed most strongly in his favor."

Civ. R. 56 (C) specifically provides that before summary judgment may be granted, it must be determined that: (1) No genuine issue as to any material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing such evidence most strongly in favor of the party against whom the motion for summary judgment is made, that conclusion is adverse to that party.

As stated recently in *Houk v. Ross* (1973), 34 Ohio St. 2d 77, 81: "Civ. R. 56 is virtually identical to the federal rule, FRCP 56, after which it was patterned." The gen-



eral view of the various federal courts supports the construction of Civ. R. 56(C) rendered herein. See *Ecology Center of Louisiana, Inc. v. Coleman* (C.A. 5, 1975), 515 F.2d 860; *Tee-Pak, Inc. v. St. Regis Paper Co.* (C.A. 6, 1974), 491 F.2d 1193; *Caplan v. Roberts* (C.A. 9, 1974), 506 F.2d 1039; *Bloomgarden v. Coyer* (C.A. D.C. 1973), 479 F.2d 201. See, generally, 6 Moore's Federal Practice 56-463 (2 Ed.), Paragraph 56.15(3). See also, *Joseph v. Portsmouth* (1975), 44 Ohio St. 2d 155.

In my view, summary judgment was inappropriately granted by the Court of Common Pleas herein both because there exist genuine issues of material fact and because the defendant is not entitled to judgment as a matter of law.

The following issues of material fact, while not exhaustive, are illustrative of questions not yet resolved in the instant cause:

1. To the extent that *Gertz v. Robert Welch, Inc.*, *supra* (418 U.S. 323), is here relevant, whether the plaintiff is a "public figure" as defined in *Gertz*?
2. Whether the plaintiff had contracted to a third party, for remuneration, the exclusive right to exhibit his performance?
3. Whether the plaintiff's contract of employment with the proprietor of the county fair included receipt of a percentage of the paid admissions?
4. Whether the broadcast of his entire act by the defendant, in total disregard of the plaintiff's express request to the contrary, constituted an invasion of the plaintiff's "right of publicity" as established by the majority opinion?

5. Whether the defendant's broadcast of plaintiff's entire performance was influenced by its commercial interests (i.e., ratings)?

In conclusion, since the plaintiff has stated a valid cause of action, since genuine issues of material facts remain unresolved, and since the majority opinion misapplies the relevant law and, therefore, in paragraph three of the syllabus, incorrectly develops the appropriate standard by which the present appeal should be measured, I must respectfully dissent from paragraph three of the syllabus, and from the judgment rendered herein.

I would affirm the judgment of the Court of Appeals, albeit for different reasons, and remand the cause to the Court of Common Pleas for trial. The effect of such a disposition would not impermissibly expose this defendant to unjustifiable litigation. It would only afford this plaintiff his day in court. Assuming, *arguendo*, that the plaintiff could discharge his burden of proving that the defendant's action economically damaged him, at that time, and in the normal course of law, the defendant could present its defense of the charge. By following this accepted procedure, the Court of Common Pleas, in the first instance, could develop the appropriate legal standard by which the unique circumstances of this cause should be tested.

In my view, a majority of this court has chosen to address and decide the novel and delicate issues of fact and law herein presented upon a woefully inadequate record. It has often been said that "good facts make bad law." However, in this case, a more appropriate cliché is "no facts make no law."



**JOURNAL ENTRY OF THE COURT OF APPEALS**

(Dated July 10, 1975)

No. 33713

COURT OF APPEALS OF OHIO  
EIGHTH DISTRICT, COUNTY OF CUYAHOGAHUGO ZACCHINI,  
*Plaintiff-Appellant,*

vs.

SCRIPPS-HOWARD BROADCASTING COMPANY,  
*Defendant-Appellee.*

APPEAL FROM COMMON PLEAS COURT

**JOURNAL ENTRY**

This cause came on to be heard upon the pleading and the transcript of the evidence and record in the Common Pleas Court, and was argued by counsel; on consideration whereof, the court certifies that in its opinion substantial justice has not been done the party complaining, as shown by the record of the proceedings and judgment under review, and judgment of said Common Pleas Court is reversed. Each assignment of error was reviewed by the court and upon review the following disposition made:

See Opinion Incorporated in This Journal Entry by Reference. See Also MANOS, J., Concurring Opinion.

No other error appearing in the record, this cause is reversed and remanded to the Common Pleas Court for further proceedings in accordance with this opinion.

It is, therefore, considered that said appellant recover of said appellee his costs herein.

It is ordered that a special mandate be sent to said Court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure. Exceptions.

/s/ JACK G. DAY  
*Presiding Judge*

DAY, P.J., MANOS, J., Concur in Judgment Only

(See Concurring Opinion)

PARRINO, J., Concur

**OPINION OF THE COURT OF APPEALS**

(Dated July 10, 1975)

No. 33713

IN THE COURT OF APPEALS OF OHIO  
CUYAHOGA COUNTY, EIGHTH DISTRICTHUGO ZACCHINI,  
*Plaintiff-Appellant,*

vs.

SCRIPPS-HOWARD BROADCASTING COMPANY,  
*Defendant-Appellee.***OPINION****SYLLABUS**

1. The protections of the First and Fourteenth Amendments to the United States Constitution extend only to state action assuming the provisions of those amend-

ments are otherwise applicable. When a private party resorts to the state courts to enforce a claimed right, action by the state court is state action for the purposes of the First and Fourteenth Amendments.

2. The protection of the First and Fourteenth Amendments to the Constitution of the United States extends to an announcement and/or a critical review of a dramatic or other entertainment event. However, those Amendments do not shield an appropriation of the property of another.

3. A performer's "act" is the product of his talent. As such it is property entitled to the same protection under the common law as any other property right.

4. The total appropriation of a performer's act by video-taping and re-showing without the performer's permission is an invasion of a property right which will give rise to a cause of action for damages based either on conversion or the invasion of the performer's common law copyright.

5. The protection of common law copyright in a performance continues unless and until lost by general publication or surrender by the owner. The right is not lost by publication before an audience under circumstances indicating no intent to dedicate the performance to the public generally.

6. The test of public dedication is partly the intent of the owner and partly the objective character of the dissemination.

7. A party claiming that a common law copyright has been lost by public dedication has the burden of proving such dedication.

DAY, J.:

Plaintiff-appellant, Hugo Zacchini (plaintiff), is a performer with a singular act. He is shot out of a cannon. The whole performance lasts about fifteen seconds.

In the summer of 1972, he took his act to the Geauga County Fair at Burton, Ohio, where he was billed as the "human cannon ball". On August 30, 1972, while engaged at the fair he saw a photographer for defendant-appellant, Scripps-Howard Broadcasting Company (defendant), carrying a camera. He approached the photographer and requested that he not photograph the act. The following day, on express orders of the defendant, the photographer did photograph plaintiff's act. The film depicting plaintiff's entire performance was shown on defendant's evening news program, but with favorable comment on its merits. The affidavit of the photographer filed in support of motion for summary judgment recites that he was admitted to the fair without paying admission and that "news reporters and cameramen are admitted to the fair by its promoters without charge in order to permit news coverage and generate publicity for the fair". The implication is that the general public paid a fee at least to gain entrance to the fairgrounds.

Plaintiff sued defendant for invasion of privacy. Defendant moved for summary judgment which the trial court granted. Plaintiff appealed without specifying assignments of error. However, two assignments can be adduced from the argument headings in his brief:

"(1) THE DEFENDANT HAS APPROPRIATED THE PLAINTIFF'S PROFESSIONAL TALENTS FOR THEIR [sic] OWN USE.

"(2) APPELLEE'S [DEFENDANT'S] CONDUCT IS NOT PROTECTED BY THE FIRST AMENDMENT." (Bracketed material supplied.)

For reasons which are assessed below, we reverse.

I.

An eminent torts scholar<sup>1</sup> divides invasions of privacy into four parts under the rubric right to privacy. These are appropriation,<sup>2</sup> intrusion<sup>3</sup>, public disclosure of private facts,<sup>4</sup> and false light in the public eye.<sup>5</sup> While the plaintiff in the present case has premised his claim on the right of privacy, we think none of Professor Prosser's categories provide a logically adequate embrace for the wrong the plaintiff claims has been done.

While it is true that a professional golfer, specializing in trick shots, did recover for an invasion of privacy when a motion picture company reproduced an exhibition he had

<sup>1</sup>Prosser, Wm. L., *Handbook of the Law of Torts*, West Publishing Co., 1971, pp. 804, et seq.

<sup>2</sup>"... appropriation for defendant's benefit or advantages, of the plaintiff's name or likeness", *id.* p. 804.

<sup>3</sup>"... intrusion upon the plaintiff's physical solitude or seclusion, as by invading his home or other quarters, or an illegal search of his shopping bag in a store." Professor Prosser points out that this branch of the right may reach wire tapping intrusions, microphones and "peering into windows of a home as well as persistent and unwanted telephone calls", *id.* pp. 807-808.

<sup>4</sup>"... a cause of action [founded] in publicity of a highly objectionable kind, given to private information about the plaintiff, even though it is true and no action would lie for defamation", *id.* p. 809. Limits on this theory of action are (1) the disclosure must be a public not a private one; (2) the facts must be private and not public; and (3) the matter made public "must be one which would be offensive and objectionable to a reasonable man of ordinary sensibilities". *id.* pp. 810-811.

<sup>5</sup>"... publicity which places the plaintiff in a false light in the public eye", *id.* p. 812.

done for Fox Movietone News,<sup>6</sup> the action was based on the New York privacy statute.

That statute specifically provided that:

"Any person whose name, portrait or picture is used within this state for advertising purposes or for the purposes of trade without . . . written consent first obtained . . . may maintain an equitable action . . . and may also sue and recover damages for any injuries sustained by reason of such use . . ."

However, discussion in the opinion in *Paulsen v. Personality Posters, Inc.*,<sup>8</sup> demonstrates the difficulty in classifying actions such as the present one as actions for the invasion of privacy. The court made the obvious point:

"... it is clear that while plaintiff is ostensibly seeking redress for an alleged 'violation of his privacy', it is not his privacy at all that concerns him. Privacy in its usual sense is hardly the goal of an entertainer or performer. What such a figure really seeks is a type of relief which will enable him to garner financial benefits from the pecuniary value which attaches to his name and picture. While such concept, which is termed the 'right of publicity', has been accorded some

<sup>6</sup>*Redmond v. Columbia Pictures Corporation* (Ct. of App. N.Y., 1938), 277 N.Y. 707.

<sup>7</sup>New York Civil Rights Law, Section 51 (McKinney, 1948).

<sup>8</sup>(Sup. Ct., N.Y. Cty., 1968), 299 N.Y.S. 2d 501. Pat Paulsen, a "put on" candidate for President of the United States unsuccessfully sought a preliminary injunction to prevent distribution of a poster bearing his picture. The court thought he faced no irreparable injury but did not foreclose his right to recover for financial loss on one or the other of the two theories upon which he based his action, *id.* 510. These were (1) violation of plaintiff's right to privacy in violation of Section 51 of the New York privacy statute, and (2) violation of plaintiff's common law copyright, *id.* 505, 510.



limited recognition (see *Haelan Laboratories v. Topps Chewing Gum*, 202 F.2d 866), the courts of this state have evidenced no inclination to adopt or follow such construction within the context of Section 51. On the contrary, it has been made clear that the purpose of the statute is to redress injury for invasions of a 'person's right to be let alone', with recovery being grounded on the mental strain, distress, humiliation and disturbance of the peace of mind suffered by such person, hardly what plaintiff here seeks, and that the statute was *not* enacted to fill gaps in the copyright law or to afford substitute relief for breaches of contract or violations of various other species of property rights." (Long italics added.) *Id.* 508.

The *Paulsen* case and, perhaps even more emphatically, the case of *Gautier v. Pro-Football, Inc.*,<sup>9</sup> illustrate the difficulties in protecting a performance against virtual confiscation even under a statute protecting the right to privacy. There is no privacy statute in Ohio and whether the common law of Ohio would give benediction to a cause of action for violation of plaintiff's privacy or not, it is a theory inappropriate to his claim. For that claim does not involve his privacy in any usual sense of the word.<sup>10</sup>

<sup>9</sup>Cf. *Gautier v. Pro-Football, Inc.* (1952), 304 N.Y. 354, 107 N.E. 2d 485, where recovery under Section 51 was denied an animal trainer whose act was telecast between halves of a professional football game without the consent of the American Guild of Variety Artists as provided in his contract with Pro-Football, Inc., and despite his formal objection, 304 N.Y. at 357, 107 N.E. 2d at 487.

<sup>10</sup>A theory of unfair competition upon which equitable relief might be posited, see *Waring v. WDAS Broadcasting Station* (1937), 327 Pa. 433, 449-456, seems equally inappropriate in the factual setting of the present case. Compare the concurring opinion in *Waring* at p. 464.

## II.

The performance which constitutes an "act" is the product of the actor's talent and is his property.<sup>11</sup> And, if his act is appropriately considered a dramatic or creative production, it involves a property right entitled to the same protection under the common law as any other property right, *Waring v. WDAS Broadcasting Station*, *id.* pp. 440-442; cf. *Caliga v. Inter-Ocean Newspaper Co.* (7 Cir., 1907), 157 F. 186, 188 (aff. 1909, 215 U.S. 182, 54 L. Ed. 150, on grounds unrelated to property right).

It happens the plaintiff's total performance consumed only fifteen seconds. This is what defendant captured on tape and televised. Such a taking is no different generically from taping and broadcasting the total performance by a violin virtuoso, a full performance by a leading opera company or a complete program by the first tenor of the world. Plaintiff's act is clearly the dramatic product of his talent and, therefore, a property right. Moreover the prospect of a total performance being captured on audio-visual tape without permission and then repeated on television without legal redress puts the consequences of such an appropriation of property in a rather appalling perspective.

Of course, total appropriation is distinguishable from mere announcements of dramatic and entertaining events

<sup>11</sup>"... a celebrity has a legitimate proprietary interest in his public personality. . . . That identity, embodied in his name, likeness, statistics and other personal characteristics, is the fruit of his labors and is a type of property." *Uhlaender v. Henricksen* (D.C. Minn., 1970), 316 F. Supp. 1277, 1282. Products of intellectual labor "not dedicated by publication to common use, are at common law property, and to be protected as such". *Thompson v. Famous Players-Lasky Corp.* (D.C. Ga., 1925), 3 F.2d 707. "A performer has a property right in his performance that it shall not be used for a purpose not intended. . . ." *Giesecking v. Urania* (S. Ct. N.Y. Cty., 1956), 155 N.Y.S. 2d 171, 172.

beforehand or critical reviews afterward. There is little quarrel with the proposition that the announcement or the review is newsworthy and protected by the First Amendment. It seems equally clear that the full performance is artistic property which cannot be taken from the artist or performer without giving rise to a cause of action. If the appropriating action needs a title in tort, conversion will do.

"... in order to constitute a conversion, it was not necessary that there should have been an actual appropriation of the property by the defendant to its own use and benefit; it might arise from the exercise of a dominion over it in exclusion of the rights of the owner, or withholding it from his possession under a claim inconsistent with his rights. If one takes the property of another, for a temporary purpose only, in disregard of the owner's right, it is a conversion. Either a wrongful taking, an assumption of ownership, an illegal use or misuse, or a wrongful detention of chattels, will constitute a conversion. . . ." *Railroad Co. v. O'Donnell* (1892), 49 Ohio St. 489, 497-498. See also *Fulks v. Fulks* (1953), 95 Ohio App. 515, 518-519.

Although a dramatic performance is considerably different from the usual object of conversion, see 50 ALR 1167, et seq., nonetheless, it is common for the existing law to reach new subjects by analogy. And it imposes small strain, if any, on the concept of conversion to reach the wrong done the plaintiff in this case but for the rule the intangibles cannot be converted. The stress on that score stems from the notion, apparently rooted in ancient history, that only tangibles can be the objects of a conversion. However, Professor Prosser has pointed out that the concept of what can be converted has been expanded to include symbols of rights such as a promissory note, a check, or a stock certificate and nothing but the lack of demonstrated neces-

sity to expand the remedy seems to explain the lack of further enlargement.<sup>12</sup> In our view this case and instances like it demonstrate the necessity for expansion.

We hold that an intangible such as the performance of the plaintiff in this case is properly subject to protection from illegal conversion.

### III.

Common law copyright is a designation for a concept protecting property rights in intellectual productions conferred by the common law. It is sometimes called "copyright before publication", *Palmer v. DeWitt* (1872), 47 N.Y. 532, 537, as distinguished from statutory copyright, i.e., "copyright after publication". Such rights as the common law conferred are not lost on limited publication, *Kurfiss v. Cowherd* (Mo. App., 1938), 121 S.W. 2d 282, 287; *F. W. Dodge Corp. v. Comstock* (S. Ct. N.Y., 1931), 251 N.Y.S. 172, 177. The right continues unless lost by general publication by the owner. It is absolute and exclusive in him while he retains it, *Jenkins v. News Syndicate Co.* (S. Ct. N.Y., 1926), 219 N.Y.S. 196, 198; *Banker v. Caldwell* (1859), 3 Minn. 46, 56; *Berry v. Hoffman* (1937), 125 Pa. Super. 261, 267-268. While general, unqualified publication or abandonment, *Boucicault v. Wood* (C.C.N.D. Ill., 1867), 3 F. Cas. 988, 992, 993, puts the publication in the public domain, the owner may set terms on the use without loss of the right beyond that necessary to the authorized use,

<sup>12</sup>Prosser, *id.*, pp. 81-83. See *Vaughn v. Wright* (1913), 139 Ga. 736, 737 (cited by Prosser):

"Were the tax receipts for which the action was brought such things of value as could be recovered in trover? Trover may be maintained for the wrongful conversion of any species of personal property which is the subject of private ownership, where the person instituting the suit is the owner of such property and entitled to the possession thereof."



*F. W. Dodge Corp. v. Comstock*, id., 176-177, *Palmer v. DeWitt*, id. at 543. The burden of proof is on the party claiming that "what once was the complainant's has now become common property, but exposure for payment of a fee indicates no dedication . . . to the public generally", *New Jersey State Dental Society v. Dentacura Co.* (1898), 57 N.J. Eq. 593, 596, aff. for reasons given in the court below (Ct. of Errors and Appeals, 1899). 58 N.J. Eq. 582. The test of public dedication is partly the intent of the owner and partly the objective character of the dissemination, cf. *Waring v. WDAS Broadcasting Station, Inc.*, supra, 444.

Dramatic scripts can be protected literary property, *Uproar Co. v. National Broadcasting Co.* (D.C. Mass., 1934), 8 F. Supp. 358, 361, modified on other grounds (1st Cir., 1936), 81 F. 2d 373, cert. den. (1936), 298 U.S. 670, 80 L. Ed. 1393; the same can be said for a musical performance; *Waring v. WDAS Broadcasting Station*, id., 440-442, and a public performance is not a dedication which dissolves the protection, *Uproar Co. v. National Broadcasting Co.*, id. at 362; there is a distinction "between performance and publication", *Waring v. WDAS Broadcasting Station*, id. at 443-444. The reason for continuing protection after the performance is the character of presentation. Because it is performed for amusement there is an obvious, indicated intent to confine the use to the limited purpose of entertainment. To allow a spectator to appropriate the presentation for reproduction would destroy other rights of the performer, cf. *Werckmeister v. American Lithographic Co.* (Cir. 2, 1904), 134 F. 321, 325, 69 CCA 553, 68 LRA rev. 244, 117 F. 360, approved, *American Tobacco Co. v. Werckmeister* (1907), 207 U.S. 284, 299, 52 L. Ed. 208, 217, with this prefatory language:

" . . . the property of the author or painter in his intellectual creation is absolute until he voluntarily parts

with the same. One or many persons may be permitted to an examination under circumstances which show no intention to part with the property right, and it will remain unimpaired."

By clear analogy the performance with which this case is concerned falls within the category of dramatic production. Nor is there any basis for a distinguishing difference merely because the action in the present case is short, does not involve a writing,<sup>13</sup> or may not be entirely original.<sup>14</sup>

Plaintiff contends that the performance was a public performance for the limited purpose of amusement which indicated an intent to confine its dedication.<sup>15</sup> If so, it was entitled to the continuing protection of common law copyright. Ultimately, however, the issue of whether that dedication was limited or general is one which must be resolved at further proceedings in the trial court.

#### IV.

The record does not indicate whether the news program carrying plaintiff's act was commercially sponsored. Some cases distinguish between viable claims and those which are not by finding that only those appropriations are actionable which are coupled with a commercial exploitation, i.e., *Gautier v. Pro-Football, Inc.*, id. 304 N.Y. at 358, 107 N.E. 2d at pp. 487-488, *Redmond v. Columbia Pictures*

<sup>13</sup>However, ownership of the right to produce an opera did not give the owner a literary property in dramatic gestures which have been held unprotected unless protected in the actors themselves, if at all. See *Savage v. Hoffman* (C.C.S.D. N.Y., 1908), 159 F. 584, 585.

<sup>14</sup>*Aronson v. Baker* (1888), 43 N.J. Eq. 365, 370-371, 12 A. 177, 180.

<sup>15</sup>The photographer was admitted free for promotional purposes only. See the quotation from the photographer's affidavit, page 1 of this opinion.



Corp. (Ct. of App., 1938), 277 N.Y. 707, 707-708, 14 N.E. 2d 636, 636-637. However, these cases were applying the New York privacy statute and turned upon the rights afforded by that statute as well as limitations upon recovery imposed by it. No such legislative enactment is involved in the present case. Nor do we decide this case on the right of privacy. The result here is simply a consequence of one or both of two theories of liability. One is the logical extension of the tort of conversion to cover an invasion of property rights superficially different but fundamentally the same as the unlawful converting of tangible property to one's own use.<sup>16</sup> The other theory of recovery is based upon the doctrine of common law copyright. Neither requires commercial exploitation as a necessary element in a valid cause of action.

When the tort of conversion is proven, the plaintiff is entitled to fair compensation for the illegal deprivation of his property:

"... a person whose property is wrongfully taken or withheld from him, many waive his right to the property in specie, and elect to pursue a remedy for damages only; and in such case, the general rule for the measure of damages is the value of the property at the time it was taken, or converted by the wrong-doer. The principle upon which this rule of damages is based is, that justice requires that the injured party should be made whole; but justice to him requires nothing more." *Lake Shore & M. S. Ry. Co. v. Hutchins* (1881), 37 Ohio St. 282, 294.

<sup>16</sup>It has been said that conversion of an intangible is impossible, *Brod v. C. T. Recorder Co.* (1947), 82 Ohio App. 26, 29, although symbolic property, such as a stock certificate, ordinarily called an "intangible", has been held the subject of conversion. The latter is clearly the underlying assumption in *The Cincinnati Finance Co. v. Booth* (1924), 111 Ohio St. 361, 365-366. We are persuaded the distinction between tangible and intangible makes no difference in the circumstances of the instant case, cf. ALR 1173.

Obviously, the converted property is not available on the facts in the present case. Because of the nature of the property it cannot be returned. Thus, an award of damages is proper if damages are proved.

When the recovery theory is common law copyright, damages are an appropriate remedy although frequently coupled with equitable relief, *Columbia Broadcasting System, Inc. v. Documentaries Unlimited, Inc.* (Sup. Ct., N.Y. County, 1964), 42 Misc. 2d 723, on reargument at page 727, 248 N.Y.S. 2d 809, 813; *Redmond v. Columbia Pictures Corp.*, *id.*; *Kurkiss v. Cowherd*, *id.*, 283, 286; cf. *Krahmer v. Luig* (Super. Ct., N.J. Ch. Div., 1974), 127 N.J. Super. 270, 273-274, 276, 317 A. 2d 96, 97, 99.

## V.

There can be no argument against the proposition that First Amendment freedoms are:

"... delicate and vulnerable, as well as supremely precious in our society." *NAACP v. Button* (1963), 371 U.S. 415, 433, 9 L. Ed. 2d 405, 418.

However, the First Amendment is not properly an issue here. There is no suggestion of a limitation on the defendant's right to comment. This case is not controlled by the reasons for reversing the plaintiff's verdict in *Time, Inc. v. Hill* (1967), 385 U.S. 374, 17 L. Ed. 2d 456. For that case involved a right to privacy to "redress false reports of matters of public interest" under the New York statute. It was reversed because it was submitted to the jury on instructions inadequately covering the defendant's knowledge of the falsity or its reckless disregard of the truth, 385 U.S. at 387-388, 394, 17 L. Ed. 2d at 467, 470. Nor is *New York Times Co. v. Sullivan* (1964), 376 U.S. 254, 11 L. Ed. 2d 686, germane. Of the several important holdings of that case the most important established that a public official

could not successfully maintain a libel suit against critics of his official conduct absent a showing that the criticism was published with knowledge of its falsity or with "reckless disregard of whether it was false or not", 376 U.S. at 279-280, 11 L. Ed. 2d at 706. More to the point for the present case, the First Amendment provides no defense to the taking of private property against the owner's explicit denial of permission.<sup>17</sup> The situation would not be altered even in the absence of an explicit refusal. For an owner need not deny permission to one who takes his property in order to ripen his right to a cause of action for ensuing damage.

The mere fact that the taking and conversion and copyright violations were done by a news medium does not quicken First Amendment rights. The entertainer's performance is his property. The constitutional protection for free dissemination of ideas is neither threatened nor diminished by protecting the owner of property from its seizure under the guise of free expression.

Moreover, a whole public performance is dramatic property, not news, cf. *Jenkins v. News Syndicate Co.*, *supra*, 198, and not an announcement nor critical review. Thus, entertainment, in the sense of a total performance, does not fall within any reasonable definition of newsworthiness warranting the use of the First Amendment to allow its *total* appropriation by a news medium.

Reversed and remanded for further proceedings in accordance with this opinion.

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<sup>17</sup>First Amendment rights have been incorporated into the Fourteenth Amendment by judicial decision which renders them limitations against state action. The plaintiff's use of the state courts to enforce his rights against the defendant involves state action sufficient to vitalize First Amendment rights. *Shelley v. Kraemer* (1948), 334 U.S. 1; *Barrows v. Jackson* (1953), 346 U.S. 249, reh. den. 346 U.S. 841. Thus, the defendant is in a position to raise the First Amendment issue if otherwise applicable. It is not.

PARRINO, J. Concurs; MANOS, J., Concurs in Judgment Only (See Concurring Opinion)

MANOS, J., Concurring in the Judgment Only:

I concur only in the judgment of the majority. Hugo Zacchini's complaint stated a claim and his case must be remanded to the Common Pleas Court for trial on the merits. However, I disagree with the majority's assertions that Mr. Zacchini's claim is predicated on conversion or common law copyright. The plaintiff appellant's claim is predicated on the defendant's appropriation of Mr. Zacchini's common law right of publicity. This case should be remanded for trial on this issue only.

In my judgment the plaintiff has a claim against the defendant for the appropriation of his common law right of publicity. The characteristics of this right were first recognized in *Haelan Laboratories Inc. v. Topps Chewing Gum* (2 Cir. 1953), 202 F. 2d 866, when Judge Jerome Frank wrote,

We think that, in addition to and independent of that right of privacy (which in New York derives from statute), a man has a right in the publicity value of his photograph, *i. e.*, the right to grant the exclusive privilege of publishing his picture, and that such a grant may validly be made 'in gross,' *i. e.*, without an accompanying transfer of a business or of anything else. Whether it be labelled a 'property' right is immaterial; for here, as often elsewhere, the tag 'property' simply symbolizes the fact that courts enforce a claim which has pecuniary worth.

"This right might be called a 'right of publicity'. For it is common knowledge that many prominent persons (especially actors, and ball players), far from



having their feelings bruised through public exposure of their likenesses, would feel sorely deprived if they no longer received money for authorizing advertisements, popularizing their countenances, displayed in newspapers, magazines, busses, trains and subways. This *right of publicity* would usually yield them no money unless it could be made the subject of an exclusive grant which barred any other advertiser from using their pictures." *Haelan* at 868 (emphasis added)

Several courts since *Haelan* have recognized that a prominent personality has an intangible right of publicity. *Cepeda v. Swift*, 291 F. Supp. 242, 245 (Mo. D.C. 1968), aff'd 415 F. 2d 1205, 1206 (8th Cir. 1969); *Motschenbacher v. R. J. Reynolds Tobacco Co.*, 498 F. 2d 821, 826 note 15 (9th Cir. 1974); *Uhlaender v. Henricksen*, 316 F. Supp. 1277, 1281 (Minn. D.C. 1970); *Cabaniss v. Hipsley*, 151 S.E.2d 496, 504-505 (Ga. App. 1966); *Sharman v. C. Schmidt and Sons Inc.*, 216 F. Supp. 401, 407 (Pa. E.D. 1963); *Hogan v. A. S. Barnes and Co.*, 114 U.S.P.Q. 314, 320 (Pa. C.P. 1957); *Canessa v. Kislak*, 235 A.2d 62, 71 (N.J. Superior Ct. 1967).<sup>1</sup>

The right of publicity originated from the judicial recognition that a celebrity has a valuable proprietary interest in the exploitation of the publicity value of his name and physical likeness. This intangible proprietary interest could not be protected by the traditional doctrine of the right to privacy.<sup>2</sup> The right of publicity cases recognized an exclusive right in the individual celebrity plaintiff to

<sup>1</sup>See *Manger v. Kree Institute of Electrolysis*, 233 F. 2d 5, 9 footnote 5 (2nd Cir. 1956), as discussed in Gordon, "Right of Property in Name, Likeness, Personality and History," 55 NW. U.L. REV. 553, 571 (1960). See also, *Ettiore v. Philco Television Broadcasting Co.*, 229 F. 2d 481 (3rd Cir. 1956) (discussed in Gordon id.)

<sup>2</sup>Gordon, id. 569, 605-613.

a species of trade name in the name which gained him fame, and a kind of trademark in his own likeness. Once protected by the law this intangible proprietary interest becomes a right of value upon which a plaintiff may capitalize by selling licenses.<sup>3</sup> Such a proprietary right obviously attains its maximum value when the prominent performer is depicted in the capacity or role for which he is famous.<sup>4</sup>

In *Hogan*, *supra*, the defendant published a book for commercial gain. The book was entitled *Golf with the Masters*. It contained several photographs of the famous golfer Ben Hogan in the act of putting. The photographs were used in the book in spite of the plaintiff's express dissent. The court awarded the plaintiff compensatory damages for the appropriation of his right of publicity. The damages were measured by the objective value of the use of Hogan's portrait depicting him playing golf.<sup>5</sup> Likewise, all of the cases that have recognized a celebrity's right of publicity involved a prominent person's recovery of damages inflicted by the defendant's appropriation of the plaintiff's portrait for commercial gain without com-

<sup>3</sup>Prosser, Op. Cit. 807. Note, "The Right of Publicity: A Doctrinal Innovation," 62 YALE LAW JOURNAL 1123 (1953). Note, 41 GEORGETOWN LAW REV. 583 (1953).

<sup>4</sup>Nimmer, "The Right of Publicity," 19 LAW AND CONTEMPORARY PROBLEMS 202, 205-206, 215-217 (1954)

<sup>5</sup>It should be noted that the *Hogan* court integrated the concept of the right of publicity into the Pennsylvania doctrine of Unfair Competition. *Hogan*, 114 U.S.P.Q. 314, 316-320. As the *Hogan* Court observed, Pennsylvania has a broad notion of Unfair Competition because that state rejected the "palming off" theory of Unfair Competition in *Waring v. WDAS Broadcasting* (1937), 327 Pa. 433, cited in *Hogan*, *supra* at 316. However, Ohio's concept of Unfair Competition is more restrictive since Ohio retains the "palming off" doctrine. *Brill v. Singer Manufacturing Co.* (1884), 41 Ohio St. 127, 138-139. Consequently I would decide Mr. Zaccchini's case solely on his right of publicity without reference to Ohio's concept of Unfair Competition.



pensating the plaintiff and without obtaining a release from the plaintiff. In these cases damages were measured by the pecuniary value of the celebrity's portrait as an ingredient in the defendant's commercial endeavor.

Mr. Zacchini's case presents the issue of the appropriation of a public performer's right of publicity in a peculiar context. In this case the plaintiff's publicity value arises from his status as a human cannonball. The defendant appropriated the plaintiff's portrait by filming and broadcasting a video tape of the plaintiff's complete flight out of a cannon. These two acts by the defendant constituted an appropriation of the plaintiff's likeness in the very capacity which Mr. Zacchini has labored to make his likeness famous and valuable. As in the *Hogan* case, the defendant ignored plaintiff's objection to the use of the photographs. This case is unique only because the Scripps-Howard Broadcasting Company did not utilize the appropriated portrait of the plaintiff as an ingredient in a commercial endeavor. In this case the defendant broadcast the plaintiff's likeness for the amusement of the news program's audience. Nevertheless, the massive media exposure inflicted by the defendant may seriously damage the plaintiff's own capacity to capitalize on the value of his likeness by selling future licenses to observe or photograph his flight out of a cannon. This type of injury, which diminishes the pecuniary value of a prominent performer's right to sell future licenses to view or photograph his likeness, is as worrisome an injury to a celebrity's right of publicity as the unjust profit which others may obtain by incorporating the likeness of a famous person into a commercial product without compensating the celebrity. Mr. Zacchini may well be able to prove that, as a result of the defendant's non-consensual broadcast of his likeness, there is less public interest in viewing him shot

out of a cannon.<sup>6</sup> This diminution of the publicity value of the plaintiff's portrait may be reflected by reduced demand on the part of County Fairs for his services, or reduced requests for licenses to photograph him by those who would otherwise seek to incorporate the publicity value of his likeness into their commercial products or advertising campaigns.

There are two proper limitations on liability for the type of appropriation of a public performer's right of publicity that occurred in this case. The first limitation is that the defendant, or its agents, must know that the performer objects to the photographing of his person. If Mr. Zacchini had performed under circumstances sufficient to justify the photographer in believing that Zacchini did not object to the filming, then that reasonable reliance on the part of the photographer would be sufficient to estop Zacchini from asserting his claim for appropriation of his right of publicity. Likewise, if Zacchini had orally consented to the filming, or had signed a release, his claim for the appropriation of his right of publicity would be barred. But in the facts of this case, the defendant had actual knowledge of the plaintiff's affirmative objection to the filming of the plaintiff's likeness. Consequently Mr. Zacchini retains his cause of action.

The second proper limitation on press liability for the type of appropriation that occurred in this case is the protection accorded the media by the First Amendment of

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<sup>6</sup>Of course it is up to the plaintiff to prove this damage. I realize that it is possible that Mr. Zacchini's publicity value may well have been augmented as a result of the exposure furnished him by the defendant. However, in view of the plaintiff's express request that the media not film his performance, he must feel that such exposure is more detrimental than beneficial to the publicity value of his likeness. Since it is possible that the plaintiff is correct, he should be afforded the opportunity to prove the extent of the injury, if any.

the United States Constitution. Reconciliation of the First Amendment with the right of publicity is a difficult task for this court since the United States Supreme Court has never attempted to reconcile the conflict between First Amendment protections and an individual's interests in his name and likeness.<sup>7</sup> However, I must concur with the majority's analysis of this point. The press in Mr. Zacchini's case appropriated a proprietary interest which the law accords pecuniary worth. That interest is the plaintiff's intangible right to capitalize on the publicity value of his portrait. While I do not believe that such an intangible proprietary interest is properly subject to either conversion or common law copyright, it is nevertheless a valuable property interest which is the engine of Mr. Zacchini's capacity to earn a living. By appropriating that proprietary interest, in spite of Mr. Zacchini's express objections, the defendant may have substantially reduced the publicity value of the plaintiff's likeness and consequently diminished the plaintiff's capacity to sell licenses for the use of his portrait. Such an appropriation exceeds fair comment. Furthermore, Mr. Zacchini's performance constituted neither pressing public business, nor

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<sup>7</sup>The United States Supreme Court recently spoke in regard to the appropriate balance between some categories of the right of privacy and the First Amendment press protection. However, neither of the two recent cases dealt with the species of privacy pertaining to press appropriation of a plaintiff's name and likeness. See *Cantrell v. Forest City Publishing Co.* 95 S. Ct. 465, 468-469, (1974) (a "false light in the public eye" privacy case); *Cox Broadcasting Corporation v. Cohn*, 95 S. Ct. 1029, 1043-1046 (1975) (a "public disclosure of private facts" privacy case wherein the press published the name of a rape victim in violation of a state statute, after the victim's name appeared on a public record). The Supreme Court has not spoken on the proper balance between First Amendment protections and the privacy issue regarding appropriations of an individual's name and portrait. Since the Supreme Court has not even begun to reconcile the appropriation problem with the First Amendment in the privacy context, it is difficult for this court to reconcile the appropriation problem with the First Amendment in the context of a right of publicity case.

a critical public event about which the public had a particularly compelling need to know. Consequently the defendant's conduct in this case does not constitute the collection and broadcast of news. Rather it constitutes a seizure of the plaintiff's proprietary interest in the publicity value of his likeness.

I would reverse and remand for trial on the issue of the defendant's appropriation of the plaintiff's right of publicity as herein delineated. Consequently I concur only in the judgment of the majority.

**JUDGMENT ENTRY OF THE COURT OF COMMON  
PLEAS RE SUMMARY JUDGMENT**

(Dated April 29, 1974)

No. 918826

IN THE COURT OF COMMON PLEAS  
STATE OF OHIO, CUYAHOGA COUNTY

---

HUGO ZACCHINI,  
Plaintiff,

vs.

SCRIPPS-HOWARD COMPANY,  
Defendant.

---

Defendant's Motion for Summary Judgment granted.

A48

**JUDGMENT ENTRY OF THE COURT  
OF COMMON PLEAS**

(Dated April 29, 1974)

No. 918826

**IN THE COURT OF COMMON PLEAS  
STATE OF OHIO, CUYAHOGA COUNTY**

---

**HUGO ZACCHINI,**  
*Plaintiff,*

**vs.**

**SCRIPPS-HOWARD COMPANY,**  
*Defendant.*

---

**Judgment for Defendant.**

A49

**RECORD FILED IN THE COURT OF  
COMMON PLEAS**

No. 73 918826

**IN THE COURT OF COMMON PLEAS  
CUYAHOGA COUNTY, OHIO**

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**HUGO ZACCHINI,**  
*Plaintiff,*

**vs.**

**WEWS SCRIPPS HOWARD BROADCASTING CO.,**  
*Defendant.*

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**COMPLAINT**

(Filed in Common Pleas Court July 2, 1973)

1. Now comes the plaintiff and says that WEWS Scripps Howard Broadcasting Company is a duly organized corporation, existing pursuant to law, and at all times herein mentioned, was engaged in the television broadcasting business.

2. Plaintiff says that he is engaged in the entertainment business and that the act which he performs is an act which was invented by his father and has been performed only by his family for the last fifty years.

3. While performing at the Burton Fair, he was approached by an employee of the defendant with regard to filming his performance, at which time, he requested that his performance not be filmed.



4. Plaintiff further says that on or about the 1st day of September, 1972, an employee of the defendant filmed the plaintiff's entire act, while he was performing at the Burton Fair, and subsequently, showed the film on defendant's T.V. Station in Cleveland, Ohio.

5. Plaintiff further says that the defendant showed and commercialized the film of his act without his consent and such conduct by the defendant was an unlawful appropriation of plaintiff's professional property.

WHEREFORE, plaintiff demands judgment against the defendant in the amount of TWENTY-FIVE THOUSAND DOLLARS (\$25,000.00) together with all costs of suit.

A TRIAL BY JURY IS HEREBY REQUESTED.

/s/ John G. Lancione

Spangenberg, Shibley, Traci & Lancione  
1500 National City Bank Building  
Cleveland, Ohio 44114  
Of Counsel

## ANSWER

(Filed in Common Pleas Court October 2, 1973)

### FIRST DEFENSE

1. Defendant, Scripps-Howard Broadcasting Company, incorrectly designated as "WEWS Scripps-Howard Broadcasting Co.," admits and avers that it is a corporation organized under and existing by virtue of the laws of the State of Ohio and at all times mentioned in the complaint was engaged in the business of TV broadcasting.

2. Defendant says that it is without knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in paragraph 2 of the complaint.

3. Defendant admits that plaintiff was at the Burton Fair, but denies each and every other allegation made and contained in paragraph 3 of the complaint.

4. Defendant admits that a news cameraman filmed the plaintiff on or about September 1, 1972, and that such film was subsequently shown on Channel 5 - WEWS, but denies each and every other allegation made and contained in paragraph 4 of the complaint.

5. Defendant denies each and every allegation made and contained in paragraph 5 of the complaint.

### SECOND DEFENSE

6. Defendant avers that the complaint fails to state a claim upon which relief can be granted.

### THIRD DEFENSE

7. For its third defense, defendant incorporates herein all of the allegations, averments, statements, admissions and denials contained in its first defense.

8. Defendant avers that the citizens of the State of Ohio have a general public interest in the activities being conducted at Fairs and particularly those of the Burton Fair, and that it is an important function and duty of a TV station to report matters of general public interest and the right to report such activities is guaranteed by the rights of freedom of speech and freedom of the press as contained in the Constitution of the United States and the State of Ohio.

9. The showing of the film complained of related to matters of general public interest and were shown without malice and within the rights guaranteed to the defendant by the Constitution of the United States and the State of Ohio and was, therefore, constitutionally privileged.

/s/ Don H. Pace

Baker, Hostetler & Patterson

1956 Union Commerce Building  
Cleveland, Ohio 44115

*Attorneys for Defendant*

### MOTION FOR SUMMARY JUDGMENT BY DEFENDANT, SCRIPPS-HOWARD BROADCASTING COMPANY

(Filed in Common Pleas Court March 11, 1974)

Defendant, Scripps-Howard Broadcasting Company (incorrectly designated in plaintiff's complaint as WEWS Scripps-Howard Broadcasting Co.), by and through its attorneys and pursuant to Civil Rule 56(B), respectfully moves this Court to enter summary judgment in favor of its dismissing the action on the ground that there is no genuine issue as to any material fact and that this defendant is entitled to judgment as a matter of law on the grounds and for the reasons stated in the brief attached hereto.

The motion is based upon the Affidavits of George J. Masur and David F. Patterson attached hereto marked Exhibits A and B respectively.

/s/ Don H. Pace

/s/ Lawrence V. Lindberg

1956 Union Commerce Building  
Cleveland, Ohio 44115

621-0200

*Attorneys for Defendant, Scripps-  
Howard Broadcasting Company*

*Of Counsel:*

Baker, Hostetler & Patterson

1956 Union Commerce Building  
Cleveland, Ohio 44115

621-0200

**EXHIBIT A****Affidavit of George J. Masur**

George J. Masur, being duly sworn deposes and says:

1. I am now employed as staff news writer with the defendant Scripps-Howard Broadcasting Company. I have personal knowledge of the matters hereinafter set forth and make this affidavit in support of the within motion.

2. In my professional capacity as a news reporter I use the name Jay Bacchus rather than my legal name of George J. Masur.

3. That during August and September of 1972 I was employed by defendant as a free lance news reporter and cameraman (also referred to as a "news stringer").

4. While employed as a news stringer, I submitted ideas for news stories to defendant's news management personnel who, if they accepted the idea, would direct me to cover the event or story. At other times, news management personnel of defendant would, on their own initiative, direct me to cover a particular news event or story.

5. On or about August 30, 1972 I attended the Burton Fair in the hope of finding a newsworthy event which could be used by WEWS on its news programs. As is my custom I carried with me a small movie camera supplied by the defendant.

6. While in attendance at the fair, I witnessed plaintiff's performance. His act consisted of him being shot out of a cannon into a net located approximately 200 feet away.

7. Plaintiff performed in a fenced-in track area which was surrounded by grandstands. There was no separate

admission charge for his performance and his act was witnessed by members of the general public in attendance at the fair.

8. Prior to his performance, on or about August 30, 1972, plaintiff approached me and inquired about my camera, my occupation and my purpose for being at the fair.

9. On or about August 30, 1972 plaintiff requested that his act not be filmed. I informed him that I was attempting to develop film to attract the public's attention to the fair and that although I did not intend to do so that day he had no right to restrict my right to film a newsworthy event.

10. On September 1, 1972, in response to inquiries made by Robert Feldman, producer of defendant's Eyewitness News Program, I mentioned that plaintiff's act had generated substantial public interest at the Burton Fair but that Zacchini had requested that the act not be filmed.

11. On September 1, 1972, Robert Feldman directed me to cover the attractions at the Burton Fair and to film plaintiff's act.

12. On September 1, 1972, I again went to the Burton Fair at which time I shot footage of plaintiff's performance. The film was submitted to defendant for use on that evening's eleven o'clock Eyewitness News Program.

13. On both occasions when I attended the Burton Fair, I entered the fairgrounds without being required to pay any admission charge. News reporters and cameramen are admitted to the fair by its promoters without charge in order to permit news coverage and generate publicity for the fair.



14. At no time while I was in attendance at the Burton Fair did any fair official or any person other than plaintiff request or demand that I not cover the Burton Fair or that I not film all or portions of the events and activities of the fair.

Further affiant sayeth not.

/s/ George J. Masur

(Jurat omitted)

### EXHIBIT B

#### Affidavit of David F. Patterson

David F. Patterson, being duly sworn deposes and says:

1. I have personal knowledge of the matters hereinafter set forth and make this affidavit in support of the within motion.

2. I am employed by the defendant Scripps-Howard Broadcasting Company as co-anchorman on defendant's eleven o'clock Eyewitness News Program.

3. On or about September 1, 1972, during the eleven o'clock Eyewitness News Program of WEWS, a fifteen second news film clip of plaintiff's act was televised.

4. While the film clip of plaintiff's act was being shown I read the script, a true copy of which is attached hereto as Exhibit B-1.

Further affiant sayeth not.

/s/ David F. Patterson

(Jurat omitted)

### EXHIBIT B-1

Transcript of Script Relating to Film Clip of The Fabulous Zacchini Read by David F. Patterson on Defendant's Eyewitness News Program on September 1, 1973:

This . . . now . . . is the story of a *true spectator sport* . . . the sport of human cannonballing . . . in fact, the great *Zacchini* is about the only human cannonball around, these days . . . just happens that, *where* he is, is the Great Geauga County Fair, in Burton . . . and believe me, although it's not a *long* act, it's a thriller . . . and you really need to see it *in person* . . . to appreciate it. . . .